Supreme Court, U.S.
FILED
JAN 25 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1003

JAMES R. HOFFA, BENJAMIN DRANOW, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, CALVIN KOVENS and SAMUEL HYMAN, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED	4
STATEMENT	7
I. Multiple Schemes and Conspiracies, and Irrelevant Transactions Prosecuted as One Single Scheme and Conspiracy to Defraud	7
II. Communications From Trial Judge to Deliberating Jury in Absence of All Petitioners and Their Counsel	18
III. Receipt By Jurors During Trial of Prejudicial Newspaper Statements and of Statements by Some Jurors Not Presented in Open Court	21
IV. Combination of Pre-Trial Publicity, Inadequate Voir Dire to Determine Prejudice Resulting From Such Publicity, the Availability to the Jury of Excluded Prejudicial Evidence, and Sequestration of the Jury on a Military Reservation	25
V. Impeachment of Petitioner Hoffa, by Use of a Conviction, Particularly One Which: (1) Was, and Still Is Not Final; (2) Was for an Offense Subsequent in Time to the Offenses Charged Here; and (3) Was Obtained for Use at This Trial by the Government's Manipulation of Indictments, Trials, and Charges	29
VI. Prejudicial Trial Errors in Violation of Governing Statute, Rule, or Due Process Clause, Which Denied Petitioners a Fair Trial	32
A. Non-public selection of petit and grand jury	32

Page

B. The removal of a juror and replacing him by an alternate, without ascertaining whether the removed juror had become unable, or disqualified, to perform his duties 33

C. Trial court's instructions as to inaudible testimony 34

D. The jury instruction that one using a position of trust to obtain benefits is performing an active fraud 35

VII. Failure of the Court to Conduct a Hearing as to Petitioner Dranow's Mental Competency to Consult With His Attorneys and to Stand Trial 35

VIII. Refusal of Trial Judge to Grant Other Petitioners a Severance From Dranow Even Though: (A) Two Letters Written by Dranow Were Extremely Prejudicial to the Other Petitioners Against Whom Such Letters Were Clearly Inadmissible; and (B) Further Irreparable Prejudice Was Caused the Other Petitioners by Dranow's Irrational Conduct During the Trial 53

REASONS FOR GRANTING THE WRIT 56

I. Multiple Schemes and Conspiracies, and Irrelevant Transactions Presented as One Single Scheme and Conspiracy to Defraud 56

II. Communications From Trial Judge to Deliberating Jury in Absence of All Petitioners and Their Counsel 61

III. Receipt by Jurors During Trial of Prejudicial Newspaper Statements and of Statements by Some Jurors, All Not Presented in Open Court 66

IV. Combination of Pre-Trial Publicity, Inadequate Voir Dire to Determine Prejudice Resulting From Such Publicity, the Availability to the Jury of the Excluded Prejudicial Evidence, and Sequestration of the Jury on a Military Reservation 70

Page

V. Impeachment of Petitioner Hoffa, by Use of a Conviction, Particularly One Which: (1) Was, and Still Is Not Final; (2) Was for an Offense Subsequent in Time to the Offenses Charged Here; and (3) Was Obtained for Use at This Trial by the Government's Manipulation of Indictments, Trials, and Charges ... 75

VI. Prejudicial Trial Errors in Violation of Governing Statute, Rule, or Due Process Clause, Which Denied Petitioners a Fair Trial 80

A. Non-public selection of petit and grand jury 80

B. The removal of a juror and replacing him by an alternate, without ascertaining whether the removed juror had become unable to or disqualified to perform his duties 81

C. Trial court's instructions as to inaudible testimony 82

D. The jury instruction that one using a position of trust to obtain benefits is performing an active fraud 83

VII. Failure of the Court to Conduct a Hearing as to Petitioner Dranow's Mental Competency to Consult With His Attorneys and to Stand Trial 84

VIII. Refusal of Trial Judge to Grant Other Petitioners a Severance From Dranow Even Though: (A) Two Letters Written by Dranow Were Extremely Prejudicial to the Other Petitioners Against Whom Such Letters Were Clearly Inadmissible; and (B) Further Irreparable Prejudice Was Caused the Other Petitioners by Dranow's Irrational Conduct During the Trial 88

CONCLUSION 90

APPENDIX A (Opinions of the Court Below) 1a

APPENDIX B (Judgment of the Court Below) 68a

APPENDIX C (Denial of Petition to Rehear) 69a

CITATIONS

Cases: Page

Adler v. *United States*, 5 Cir., 182 Fed. 464 83
Ah Fook Chang v. *United States*, 9 Cir., 91 F. 2d 805 .. 63
Arrington v. *Robertson*, 3 Cir., 114 F. 2d 821 .....62, 65
Baker v. *Hudspeth*, 10 Cir., 129 F. 2d 779 68
Beasly v. *United States*, D.C. Cir., 218 F. 2d 366, cert. den. 349 U.S. 907 75
Beck v. *Washington*, 369 U.S. 541 74
Bihn v. *United States*, 328 U.S. 633 65
Billeci v. *United States*, D.C. Cir., 184 F. 2d 394 83
Bishop v. *United States*, 350 U.S. 961 85
Bloch v. *United States*, 9 Cir., 226 F. 2d 185, cert. den. 350 U.S. 948 76
Bollenbach v. *United States*, 326 U.S. 607 .....56, 64, 84
Briggs v. *United States*, 6 Cir., 221 F. 2d 636 68
Brown v. *United States*, D.C. Cir., F. 2d , 11/10/66 .....75, 77, 78
Campbell v. *United States*, D.C. Cir., 176 F. 2d 45 ....75, 76
Canella v. *United States*, 9 Cir., 157 F. 2d 470 .....57, 58
Chambers v. *State of Florida*, 309 U.S. 227 (1940) 74
Chambers v. *United States*, 8 Cir., 237 Fed. 513 63
Clawans v. *District of Columbia*, D.C. Cir., 62 F. 2d 383 79
Commonwealth v. *McIntyre*, 417 Pa. 415, 208 A. 2d 257 (1965) 80
Connley v. *United States*, 9 Cir., 46 F. 2d 53 83
Coppedge v. *United States*, D.C. Cir., 272 F. 2d 504 ... 68
Daily v. *United States*, 9 Cir., 282 F. 2d 818 57
Delaney v. *United States*, 1 Cir., 199 F. 2d 107 70
Diaz v. *United States*, 223 U.S. 442 65
Dodge v. *United States*, 2 Cir., 258 Fed. 300, cert. den. 250 U.S. 660 63
Dusky v. *United States*, 362 U.S. 402 87
Epstein v. *United States*, 6 Cir., 174 F. 2d 754 83
Estes v. *Texas*, 381 U.S. 532 70
Estes v. *United States*, 5 Cir., 335 F. 2d 609, cert. den. 379 U.S. 964 63
Evans v. *United States*, 6 Cir., 284 F. 2d 393 62
Fenwick v. *United States*, D.C. Cir., 252 F. 2d 124 ....75, 76
Fina v. *United States*, 10 Cir., 46 F. 2d 643 .....62, 65
Fiswick v. *United States*, 329 U.S. 211 59
Floyd v. *United States*, 5 Cir., 365 F. 2d 368 (1966) ... 85
Formon v. *United States*, 361 U.S. 416 59
Frantz v. *United States*, 6 Cir., 62 F. 2d 737 83

	Page
Gomila v. *United States*, 5 Cir., 146 F. 2d 372	64
Grosso v. *United States*, Oct. Term 1966, No. 181, 3 Cir., 358 F. 2d 154	61
Grunewald v. *United States*, 353 U.S. 391	56, 59, 60
Hansford v. *United States*, D.C. Cir., 365 F. 2d 920	86, 88
Henry v. *United States*, 6 Cir., 204 F. 2d 817	68
Hoffa v. *United States*, U.S. , 87 S. Ct. 408	29, 31
Hoffa v. *United States*, 6 Cir., Nos. 16567 and 16991	31
Hoffa v. *United States*, 7 Cir., 367 F. 2d 698	1
Holt v. *United States*, 10 Cir., 94 F. 2d 90	90
Irvin v. *Dowd*, 366 U.S. 717	70
Janko v. *United States*, 366 U.S. 716	68
Jones v. *United States*, 10 Cir., 299 F. 2d 661, cert. den. 371 U.S. 864	63, 65
Kenner v. *United States*, 8 Cir., 286 F. 2d 208	87
Kotteakos v. *United States*, 328 U.S. 750	56, 57, 59, 60, 90
Krulewitch v. *United States*, 336 U.S. 440	56, 59, 90
Krupnick v. *United States*, 8 Cir., 264 F. 2d 213	88
Levine v. *United States*, 362 U.S. 610	62
Lewellyng v. *United States*, 5 Cir., 320 F. 2d 104	88
Little v. *United States*, 10 Cir., 73 F. 2d 861	63
Luck v. *United States*, D.C. Cir., 348 F. 2d 763	77, 78
Lutwak v. *United States*, 344 U.S. 604	56
McCandless v. *United States*, 298 U.S. 342	65
Marshall v. *United States*, 360 U.S. 310	70
Mattox v. *United States*, 146 U.S. 140	68, 70
Meador v. *United States*, 9 Cir., 332 F. 2d 935	88
Osborne v. *United States*, 8 Cir., 351 F. 2d 111	63
Outlaw v. *United States*, 5 Cir., 81 F. 2d 805	62, 63
Paoli v. *United States*, 352 U.S. 232	56
Parker v. *Gladden*, U.S. , 87 S. Ct. 468	66, 67, 68, 69
Pate v. *Robinson*, 383 U.S. 375 (1966)	85, 86
Patterson v. *State of Colorado*, 205 U.S. 454	73
Peppers v. *United States*, 6 Cir., 37 F. 2d 346	63
Perry v. *United States*, D.C. Cir., 195 F. 2d 37	87
Ponci v. *Fessenden*, 258 U.S. 254	65
Pouncey v. *United States*, D.C. Cir., 349 F. 2d 699	85, 88
Ray v. *United States*, 8 Cir., 114 F. 2d 508, cert. den. 311 U.S. 709	63
Remmer v. *United States*, 347 U.S. 227	68
Rice v. *United States*, 8 Cir., 356 F. 2d 709	62

	Page
Richards v. *United States*, D.C. Cir., 192 F. 2d 602, cert. den. 342 U.S. 946	75
Rinella v. *United States*, 7 Cir., 60 F. 2d 216	78
Rocha v. *United States*, 9 Cir., 288 F. 2d 545	57, 58
Scott v. *United States*, 5 Cir., 263 F. 2d 398	90
Securities and Exchange Commission v. *Chenery Corp.*, 318 U.S. 80	84
Sheppard v. *Maxwell*, 384 U.S. 333	66, 73, 74
Shields v. *United States*, 273 U.S. 583	61, 62, 64
Simmons v. *United States*, 142 U.S. 148	70
Snyder v. *Massachusetts*, 291 U.S. 97	62
Stone v. *United States*, 6 Cir., 113 F. 2d 70	66
Swain v. *Alabama*, 380 U.S. 202	71
United States v. *Accardo*, 7 Cir., 298 F. 2d 133	68
United States v. *Agueci*, 2 Cir., 310 F. 2d 817	63
United States v. *Behrens*, 375 U.S. 162	62
United States v. *Borelli*, 2 Cir., 336 F. 2d 376	57, 60
United States v. *Bozza*, 2 Cir., 365 F. 2d 206 (1966)	90
United States v. *Bufalino*, 2 Cir., 285 F. 2d 408	56, 60
United States v. *Cipullo*, 2 Cir., 170 F. 2d 311	77
United States v. *Clarke*, 3 Cir., 343 F. 2d 90	90
United States v. *Compagna*, 2 Cir., 146 F. 2d 524, cert. den. 324 U.S. 867	63
United States v. *Crimmins*, 2 Cir., 123 F. 2d 271	59
United States v. *Douglas*, 7 Cir., 155 F. 2d 894	65
United States v. *Echeles*, 7 Cir., 352 F. 2d 892	90
United States v. *Empire Packing Co.*, 7 Cir., 174 F. 2d 16, cert. den. 337 U.S. 959	76
United States v. *Gersh*, 2 Cir., 328 F. 2d 460, cert. den. sub nominee *Mugnola* v. *United States*, 377 U.S. 992	68
United States v. *Goss*, 4 Cir., 329 F. 2d 180	57, 90
United States v. *Grady*, 7 Cir., 185 F. 2d 273	66
United States v. *Haupt*, 7 Cir., 136 F. 2d 661	90
United States v. *Jackson*, 3 Cir., 257 F. 2d 41	64
United States v. *Kelly*, 2 Cir., 349 F. 2d 720, cert. den. 384 U.S. 947	90
United States v. *Levi*, 7 Cir., 177 F. 2d 827	76
United States v. *Minuse*, 2 Cir., 114 F. 2d 36	83
United States v. *Napoleone*, 3 Cir., 349 F. 2d 350	72
United States v. *Neal*, 3 Cir., 320 F. 2d 533	62
United States v. *Noble*, 3 Cir., 155 F. 2d 315	64

Page

United States v. *Owens*, 2 Cir., 271 F. 2d 425 .....76, 77
United States v. *Peoni*, 2 Cir., 100 F. 2d 401 59
United States v. *Pinna*, 7 Cir., 229 F. 2d 216 78
United States v. *River Rouge Imp. Co.*, 269 U.S. 411 .. 65
United States v. *Russano*, 2 Cir., 257 F. 2d 712 57
United States ex rel. Shapiro v. *Jackson*, 2 Cir., 263 F. 2d 282 63
United States v. *Standard Oil Co.*, N.D. Ind., 165 F. Supp. 359 81
United States v. *Walker*, 6 Cir., 301 F. 2d 211 87
United States v. *Wortman*, 7 Cir., 326 F. 2d 717 ...56, 59, 60
Wagner v. *United States*, 9 Cir., 264 F. 2d 524 81
Walker v. *United States*, D.C. Cir., 322 F. 2d 434 ....62, 63
Wear v. *United States*, D.C. Cir., 218 F. 2d 24 87
Whalen v. *United States*, 5 Cir., 367 F. 2d 468 .....86, 88
Wheaton v. *United States*, 8 Cir., 133 F. 2d 522 .....62, 68
Williams v. *Great Southern Lumber Company*, 277 U.S. 19 65
Williams v. *United States*, 9 Cir., 93 F. 2d 685 83
Yazoo & Mississippi Valley R. Co. v. *Mullins*, 249 U.S. 531 65

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:

Fifth Amendment to the Constitution of the United States 4
Sixth Amendment to the Constitution of the United States 4, 65, 69, 70
18 U.S.C. Sec. 4244 .....3, 5, 84, 86
28 U.S.C. Sec. 1254(1) 2
28 U.S.C. Sec. 1861 .....3, 5, 81
28 U.S.C. Sec. 1864 .....3, 6, 32, 81
Federal Rules of Criminal Procedure
Rule 8 .....6, 56, 59
Rule 24(c) 3, 6, 81, 82

MISCELLANEOUS:

Borchard, Convicting the Innocent (1932) 121, 138, 163, 232, 365-366 78
Frank, Not Guilty (1957) 106-107 78
House Report No. 1319, 1949 U.S. Code Cong. Service, 1928 87

Page

Ladd, Credibility Tests—Current Trends, 89 U. of Pa. L. Rev. 166, 174-178, 189 ..... 79, 80
McCormick, Evidence (1954) Sec. 43 80
Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 764-778 (1961) .. 78, 79, 80
Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime, 78 Harv. L. Rev. 426, 442 ..... 78, 80
Report of Committee of the Judiciary Conference to Study Treatment Accorded by Federal Courts to Insane Persons Charged with Crime, 1944 87
Senate Report No. 209, 81st Cong., 1st Session 87
2 Wigmore, Evidence (3d Ed. 1940) Sec. 519, pp. 602, 608 79

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v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on October 4, 1966.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 367 F. 2d 698 and are printed as Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on October 4, 1966. A timely petition for rehearing was denied on November 28, 1966 (Appendix C, *infra*). On December 16, 1966, Mr. Justice Clark extended the time for the filing of a petition for a writ of certiorari to January 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether it was prejudicial error to admit evidence of many transactions which did not relate to the common object of the claimed scheme and conspiracy, and either were wholly irrelevant or tended to prove separate and multiple schemes and conspiracies.

II. Can criminal convictions stand where there were communications between the Court and the jury during the jury deliberations in the absence of petitioners and their counsel, and there has been no showing that these communications were not prejudicial to the petitioners.

III. Whether the trial court was required to grant a new trial or, at a minimum, to make inquiry where it was shown that during the course of the trial and before jury deliberations: (a) highly prejudicial and erroneous newspaper statements, pertaining to the trial judge's denial of motions for acquittal, and the content of certain evidence excluded by him as too prejudicial, reached the sequestered jury, and were read by at least one juror; and (b) some jurors made many statements of a prejudicial character to other jurors.

IV. Whether the combination of pre-trial publicity, inadequate voir dire to determine prejudice resulting

from such publicity, the availability to the jury of excluded prejudicial evidence, and sequestration of the jury on a military reservation, violated petitioners' rights to a fair trial under the Fifth and Sixth Amendments to the Constitution.

V. Whether it was reversible error to impeach a defendant by use of a conviction, particularly one which: (a) was, and still is, not final; (b) was for an offense subsequent in time to the offenses charged here; and (c) was obtained for use at this trial by the Government's manipulation of indictments, trials and charges.

VI. Whether petitioners were denied a fair trial because: (a) 28 U.S.C. Section 1864 was violated by drawing the petit and Grand Jury venires without public declaration of the names drawn; (b) F.R.Cr.P. Rule 24(c) and 28 U.S.C. Section 1861 were violated by removing a juror and replacing him by an alternate without ascertaining whether the removed juror had become unable, or disqualified, to perform his duties; (c) due process was violated by instructing the jury that inaudible responses of an important Government witness should be taken as affirmative responses against the petitioners; and (d) in the circumstances of this mail fraud case, the trial court instructed the jury that fraud and breach of trust are equivalents.

VII. Whether by reason of either (a) due process of law or (b) 18 U.S.C. § 4244, a trial judge is required to conduct a hearing or to order a mental examination to determine a defendant's mental competency, when irrational conduct of such defendant is brought to the trial judge's attention.

VIII. Whether it was reversible error for the trial judge to deny petitioners a severance from a co-peti-

tioner even though: (a) two letters written by the co-petitioner were extremely prejudicial to the other petitioners, against whom such letters were clearly inadmissible; and (b) further irreparable prejudice was caused the other petitioners by the co-petitioner's irrational conduct during the trial.

The foregoing questions are discussed in this petition as reasons for granting the writ. Questions IX and X which follow are reserved for argument on the merits in connection with related questions presented.

IX. Whether the petitioners, or any of them, were deprived of their Constitutional rights to a speedy trial.

X. Whether the other petitioners were entitled to severance from petitioner Hoffa, because joint trial with him subjected them to prejudice from the Hoffa publicity, the Government's manipulation of trials to impeach Hoffa, the Hoffa impeachment, and the military sequestration of the jury.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *."

Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

an impartial jury of the State and district wherein the crime shall have been committed, * * *."

Section 4244, Title 18, United States Code, provides in pertinent part:

"Whenever * * * the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused * * * to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. * * * If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. * * *"

Section 1861, Title 28, United States Code, provides in pertinent part:

"Any citizen of the United States who has attained the age of tweny-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

* * * * *

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

Section 1864, Title 28, United States Code, provides in pertinent part:

"The names of grand and petit jurors shall be publicly drawn from a box * * *."

Rule 8, Federal Rules of Criminal Procedure, provides:

"Rule 8. Joinder of Offenses and of Defendants.

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 24(c), Federal Rules of Criminal Procedure, provides in pertinent part:

"(c) Alternate Jurors. * * * Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. * * *."

STATEMENT

The indictment in 28 counts charged 27 substantive violations of the mail and wire fraud statutes, and a conspiracy to commit such substantive violations. Each count charged all petitioners. The trial judge acquitted all of petitioners on five substantive counts, and two substantive counts were dismissed on the Government's motion. The jury found all of petitioners guilty on the conspiracy count, and certain of them guilty on various of the remaining substantive counts. The sentences imposed ranged from five years imprisonment and a $10,000 fine for Petitioner Hoffa to one hour in custody and a $5,000 fine for Petitioner Weinblatt. (I D.A. 41-77, 25, 28, 31-32).[1] The Court of Appeals affirmed all convictions by a two to one vote, and denied rehearing *en banc* by vote of seven to two.

The following facts are grouped in the same order as the corresponding reasons for granting the writ to which they are pertinent.

I. Multiple Schemes and Conspiracies, and Irrelevant Transactions Prosecuted as One Single Scheme and Conspiracy to Defraud

The first 27 counts of the twenty-eight count indictment alleged the same scheme to defraud the Central States, Southeast and Southwest Areas (Teamsters) Pension Fund (hereinafter referred to as "the

[1] "D.A." references are to the volume and page of the Consolidated Appendix for Appellants as printed for the Court of Appeals. "G.A." references are to the pages of the Government's Additional Appendix as printed in one volume for the Court of Appeals. "Tr." and "Ex." references are, respectively, to the typewritten transcript of the trial proceedings, and the exhibits received at trial, all now on file with the Court.

Fund").[2] The last count charged a conspiracy to execute that scheme. Each count alleged that all of the defendants banded together to obtain, by means of false and fraudulent representations, 21 specified loans totalling $20,000,000 from the Fund for 14 separate businesses. It was further charged that for obtaining these loans the defendants demanded and were paid by the said businesses fees and other benefits totalling $1,000,000. Finally, the indictment charged a bifurcated object of the conspiracy and scheme: (1) To obtain $100,000 of such fees and benefits for the purpose of relieving the financial distress of Sun Valley, Inc., a real estate development company in which Petitioner Hoffa was claimed to have an interest;[3] and (2) To obtain the entire $1,000,000 in fees

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[2] The Fund is jointly administered by eight employer and eight union trustees. The employer trustees are designated by various employer associations and groups. The union trustees are designated by the signatory unions. (Ex. 1, Article II, Sec. 2; III D.A. 1959; I D.A. 555). Employer and union trustees are geographically assigned. (III D.A. 1961)

In addition, there is an advisory board of trustees which is comprised of 18 employer representatives and 18 union representatives, selected by the employers and the unions respectively. (Ex. 1, Article VIII; III D.A. 1964; I D.A. 555)

Each trustee has one vote only, and no one trustee has any authority over any other. (Ex. 1, I D.A. 874; III D.A. 1964)

The Fund regularly invests a part of its $300,000,000 assets in loans to real estate ventures such as those involved in this case. (I D.A. 818-822, 868-873; III D.A. 1795, 1967-1971).

[3] Both the majority and dissenting opinions below agreed that the common object or design of the claimed scheme and conspiracy was to obtain money for the purpose of relieving the financial distress of Sun Valley for Hoffa's benefit (App. A, *infra*, pp. 11a-12a, 47a).

and benefits for the personal use of all of the defendants.[4] (I D.A. 41-77).

The evidence, more fully set forth in the dissenting opinion below (App. A, *infra*, pp. 44a-67a), may be briefly summarized as follows:

Sun Valley, Inc. On July 2, 1958, the beginning of the alleged scheme and conspiracy, a Florida bank was holding $400,000 of the funds of the Detroit local union of which Hoffa was president. The bank claimed that these funds were security for a loan to Sun Valley, Inc. At this time Sun Valley was in financial distress and undergoing reorganization proceedings. (I D.A. 556, 588, 589, 597, 601, 602). The Government claimed that prior to the Sun Valley reorganization Hoffa had an interest in it. (See e.g., I D.A. 44, 619; III D.A. 1979-1982). Petitioners Dranow and Burris, together with others not claimed to be conspirators, took steps to reorganize and refinance Sun Valley (II D.A. 1403, 1405, 1407, 1554-55). The Government adduced evidence that Petitioners Kovens, Hyman and Strate invested in or contributed money to this refinancing. (II D.A. 894-95, 1084, 1408, 1414, 1423; Govt. Ex. 153-8, 494). The Government claimed that $100,000 of the fees and other benefits which Dranow and Burris allegedly received for helping to obtain the Everglades, Key West, Fontainebleau, First Berkeley and other loans was a portion of the $550,000 which was provided to refinance Sun Valley. By June 27, 1960, all of Sun Valley's obligations had been paid, the trusteeship dissolved, and Sun Valley had been suc-

[4] By means of this broader allegation the Government alleged, and was permitted to prove, loan transactions which were irrelevant to the common object of the scheme and conspiracy to defraud the Fund.

ceeded by Union Land and Home Company. Furthermore, the Detroit local union had been repaid its $400,000 by the Florida National Bank. (I D.A. 590; II D.A. 1401-02; Govt. Ex. 22).

First Everglades Loan. The Fund loaned Vaughan B. Connelly 3.3 million dollars in January 1959 to remodel the Everglades Hotel in Miami, Florida. (I D.A. 688, 690, 802-803). Dranow was alleged to have received a finder's fee for obtaining this loan. (I D.A. 629, 658-59). Burris assisted in preparing the application for the loan. (I D.A. 629). Kovens was the contractor. (I D.A. 624-26). The Government failed to prove material misrepresentations to, or fraud on, the Fund in the obtaining of this loan. (App. A, *infra*, p. 51a). The indictment did not contain a substantive count based upon this loan.

Second Everglades Loan. A second loan of one million dollars was made to the Everglades Hotel in July 1959. Dranow and Burris assisted with the application for the loan. (I D.A. 663, 667). Kovens' only connection with this loan was as the contractor for the project. There was no allegation or evidence of direct misrepresentations to or fraud on the Fund in the obtaining of this loan. (App. A, *infra*, p. 51a). Petitioners Strate and Hyman had no connection whatsoever with either loan to the Everglades. There was no evidence that the proceeds of either of these loans were used in refinancing Sun Valley. (App. A, *infra*, pp. 50a-51a). Contrary to the majority opinion below (App. A, *infra*, p. 9a), there was no evidence that the $15,000 invested by Connelly in Sun Valley came from Fund loan proceeds. (G.A. 165).

First Fontainebleau Loan. In July 1959 the Pension Fund loaned the Pelican State Hotel Corporation,

owned in part by Petitioner Strate, $1,350,000 to enlarge the Fontainebleau Hotel in New Orleans, Louisiana. (II D.A. 1063-64, 1066). Petitioner Dranow assisted with the application for the loan, and the Government adduced evidence that he received a finder's fee for his efforts. (II D.A. 1062, 1067-68, 1103-04). There was no evidence of any material misrepresentations to, or fraud on, the Fund in the obtaining of this loan.

Second Fontainebleau Loan. An additional $2,325,000 was loaned to the Hotel in February 1960. (II D.A. 1078, 1518). Burris and Dranow assisted in preparing the application for this loan, and the Government adduced evidence that Dranow received a finder's fee. (II D.A. 1069). There was also evidence of misrepresentations to the Fund in connection with this loan. (II D.A. 1075-76, 1155-56).

Third Fontainebleau Loan. A third loan of $500,000 was granted in December, 1960. (G.A. 127). Again, Burris and Dranow assisted in the preparation of the application. (II D.A. 1068-1072). There was evidence of misrepresentations. The loan was granted after the rehabilitation of Sun Valley. (G.A. 127).

Fourth Fontainbleau Loan. A fourth loan of $500,000 was made to the Hotel in March 1961. (G.A. 127). Burris and Dranow assisted in preparing the application for the loan (II D.A. 1068-1072), but there was no evidence of any misrepresentations to, or fraud on, the Fund in connection with the loan. The loan was granted almost one year after Sun Valley had been rehabilitated. The indictment did not contain a substantive count based upon this transaction.

Kovens and Hyman were not connected in any way with any of the four Fontainebleau loans.

First Key West Loan. In July 1959, the Pension Fund loaned $875,000 to the Key West Foundation Company, owned partially by Petitioner Hyman. Burris assisted in obtaining the loan. (III D.A. 1683). The sum of $275,000 was to be used to pay off an existing mortgage on land owned by the company and to construct a small shopping center. No limitation was placed on the use of the balance of the proceeds. (II D.A. 1493; Tr. 11271). The District Court directed a verdict of acquittal for the defendants on the substantive count relating to this loan for failure to prove any material misrepresentation. (I D.A. 878; III D.A. 1773). The evidence, however, was not stricken.

Second Key West Loan. A $400,000 loan to Key West was approved in June 1960 for the remodeling of the Poinciana Apartments. (G.A. 132-34; II D.A. 1497). The proceeds of this loan were not disbursed until after Sun Valley had been rehabilitated. (G.A. 135-38; Govt. Ex. 410; App. A, *infra*, p. 53a). Kovens and Strate were not connected with these two loans in any manner.

La Concha-Casa Marina Loans. In January 1962 the Fund loaned Hyman a total of $650,000 for the purchase of the La Concha and Casa Marina Hotels in Key West Florida. (G.A. 297-303, 304-310). No finder's fees were paid in connection with these loans. The proceeds were disbursed almost two years after Sun Valley had been rehabilitated. The indictment did not allege any misrepresentation to the Fund in obtaining these loans. The Government, however, adduced evidence of claimed misrepresentation. (II D.A. 882-84; G.A. 306, 307). Kovens, Strate and Dranow were not connected with these loans.

The initial First Berkeley Loan. In January 1960, the Pension Fund loaned the First Berkeley Corporation, owned by Burris, $266,000 to acquire the Beverly-Wilshire Health Club in Los Angeles. (II D.A. 1562). The Government conceded at trial that no misrepresentations were made in connection with this loan. (Tr. 10627-28). No finder's fees were paid, and no connection with Sun Valley was shown.

The second First Berkeley Loan. In March 1960, the Fund granted an application for an additional $2,996,000 loan to purchase the Cornell Buildings in Los Angeles. (G.A. 271-72). The Government adduced evidence of misrepresentation (II D.A. 1223, 1384-85, 1419). The evidence did not connect this loan with the rehabilitation of Sun Valley.

The third First Berkeley Loan. This loan of $300,000 for improvements to the Cornell Buildings was disbursed in April 1961, almost one year after the rehabilitation of Sun Valley. (I D.A. 799). There was no evidence of any material misrepresentations to, or fraud on, the Fund in connection with this loan. The district court directed a verdict of acquittal on the two substantive counts relating to this loan (I D.A. 39; II D.A. 1564). The evidence with respect thereto was not stricken.

Hyman, Strate and Kovens were not connected with the three First Berkeley loans. However, Burris pledged some stock which belonged to Kovens as collateral for the second loan. (G.A. 315, 351).

The First Good Samaritan Loan. In September, 1959, the Fund granted a loan to Good Samaritan Hospital, Inc., owned by one Burt Sager, to finance the construction of a hospital. (II D.A. 1303-05; Govt. Ex. 181-17). Proceeds of the loan were not disbursed

until November 1960. (Govt. Ex. 181-15, 182-3). Burris assisted Sager's accountant in preparing the application for the loan. (II D.A. 1303-04). Kovens was the contractor. (II D.A. 1303-04). During the trial the Government conceded that all of the proceeds of this loan, as well as of the second loan, were properly used to build the hospital (Tr. 15295-96, 15299). The Government adduced evidence of misrepresentations. The evidence as to materiality was equivocal. (App. A, *infra*, p. 56a).

The Second Good Samaritan Loan. A second loan of $500,000 was granted to Good Samaritan in June 1961. (Govt. Ex. 178-26) There was no evidence of any material misrepresentations to, or fraud on, the Fund in connection with this loan. (App. A, *infra*, p. 57a).

Petitioners Strate, Hyman and Dranow had no connection with the Good Samaritan loans.

4306 Duncan Corp. Loan. In December 1959, the Fund loaned $849,000 to the 4306 Duncan Corp., which was owned by Fred Strecker, a Pension Fund Trustee. Although the Government adduced evidence of misrepresentations (II D.A. 1336-49), the loan had no relation to Sun Valley, and no fees were paid in connection with it. No petitioner received any benefit from it. Dranow and Burris assisted Strecker in obtaining this loan. (II D.A. 1339-41, 1343-45, 1367-73). Kovens, Strate and Hyman had no connection with it.

The Miracle Plaza Loan. In June 1960, the Fund granted a loan of $1,100,000 to refinance mortgages on the Miracle Plaza Shopping Center in Vero Beach, Florida. (I D.A. 756, 792). Petitioner Kovens was associated with Miracle Plaza. There was no evidence

of any misrepresentation to, or fraud on, the Fund in the obtaining of this loan, nor was it linked to Sun Valley. The substantive count relating to this loan was dismissed for failure to prove fraud. (App. A, *infra*, p. 62a). The evidence was not stricken. No other petitioner was shown to be connected with this loan.

The Miami International Airport Hotel and the Birmingham Airport Motel Loans. In 1959 the Fund loaned $2,000,000 to Airport Hotel, Inc., for the construction of the Miami International Airport Hotel. In 1961 a second loan of $1,000,000 was made to the Birmingham Airport Motel in Birmingham. A Miami accountant, George Simon, was involved in these ventures. (II D.A. 1179-80, 1182-85). Burris assisted Simon in obtaining each loan, for which he received a fee. (II D.A. 1181-82, 1182-85). There was no evidence of any misrepresentation to, or fraud on, the Fund in conjunction with these loans, or of any relationship with Sun Valley. Petitioners Strate, Hyman and Kovens were not connected with the loans.

The Club 300 Loan. The Fund loaned $900,000 to Club 300 in 1961 to finance a motel and bowling alley. (II D.A. 1392, 1411). There was no evidence of any misrepresentation to, or fraud on, the Fund in connection with this loan. The Government dismissed the substantive count relating to this loan at the conclusion of the case for failure to prove fraud (App. A, *infra*, p. 63a). There was no relationship between this loan and Sun Valley. Petitioners Kovens, Strate and Hyman were not connected with this loan.

The Causeway Inn Loans. Loans of $1,500,000 and $350,000 were granted in late 1960 and 1961, respectively, to construct a motel in Tampa. (II D.A. 1295, 1384, 1389). In January 1963, a third loan in the

amount of $1,000,000 was granted for the expansion of the motel. (II D.A. 1540-50). The Court entered a judgment of acquittal on the substantive count relating to the first two loans for failure to prove fraud. (App. A, *infra*, p. 64a). No substantive count related to the third loan. There was no evidence of any misrepresentation to, or fraud on, the Fund in obtaining any of these loans. Burris received a fee for assisting in obtaining these loans. (II D.A. 1390-91; Gov't Ex. 672, 673). Kovens' only connection with the loan was that he was hired as the contractor after the loans were granted. (II D.A. 1388). Strate and Hyman were not connected with these loans in any manner.

Petitioner Hoffa was one of 16 Trustees of the Pension Fund. As such he had one vote in regard to each loan application. It was only as such trustee that petitioner Hoffa functioned in the matters involved herein. He had no interest in any of the business ventures to which the Fund made loans. Petitioner Weinblatt was not shown to be connected with any of the loans. Dranow maintained some of his bank accounts in Weinblatt's name. The proof of that fact was the only evidence relating to Weinblatt.

There was no evidence that the Fund lost any money on any of the loans. There was a default and foreclosure only on the Everglades Loans. (I D.A. 676). All of the fees mentioned in the evidence were paid by the recipients of the loans; none was paid by the Fund itself.

The convictions were affirmed below by a two to one decision. The majority held: (1) "The Government had the burden to prove that the defendants conspired to and did devise a scheme to defraud the Pension Fund by submitting false and fraudulent representa-

tions and concealing material facts from the Pension Fund Trustees and staff in order to obtain Pension Fund Loans"; (2) ". . . the central purpose of the conspiracy and scheme was to 'bail out' Sun Valley"; (3) "the burden also rested on the Government to demonstrate that the central object of the conspiracy was to obtain money for the purpose of 'bailing out' Sun Valley . . ."; and (4) ". . . the proof in this case was sufficient for the jury to find that a single conspiracy did exist and that each defendant was a knowing member of it . . .". (App. A, *infra*, pp. 11a-12a).

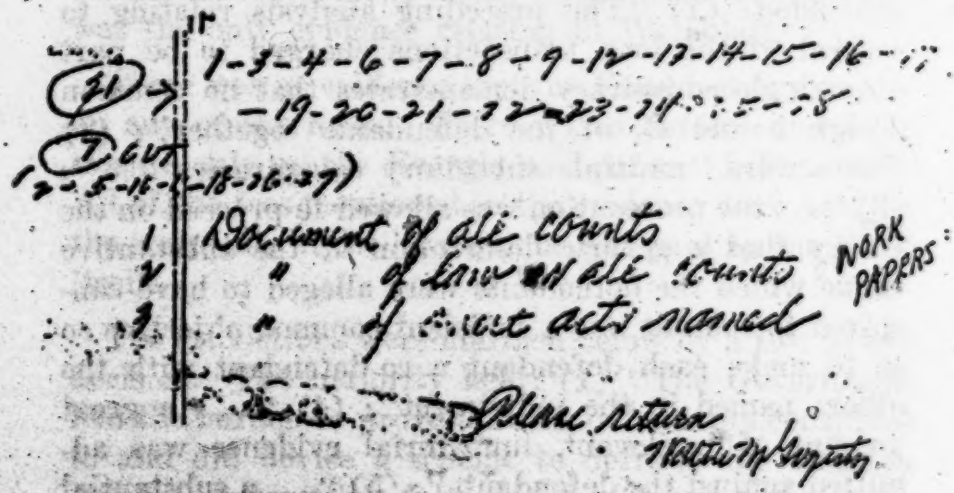
However, the majority did not discuss at all the petitioners' contentions that much of the evidence adduced by the Government was irrelevant to the charge of fraud, or to the common object of the scheme and conspiracy charged, or to both. Further, the majority did not undertake to demonstrate how the twenty-one separate loan transactions proved one single scheme and conspiracy among all of the petitioners.

The dissenting Judge devoted twenty pages of his opinion to a consideration of these issues. The dissent concluded: (1) "The preceding analysis relating to several of the loan transactions charged to be part of a single conspiracy demonstrates that no common design bound all of the defendants together"; (2) There were "multiple subsidiary conspiracies . . ."; (3) ". . . the prosecution was allowed to proceed on the theory that a generic description of the substantive crime which the defendants were alleged to have conspired to commit was a sufficient common objective so as to make each defendant a co-defendant with the others named in the indictment"; (4) ". . . a great amount of irrelevant, immaterial evidence was admitted against the defendants"; (5) ". . . a substantial

number of the loan transactions as to which evidence was offered and received had no logical tendency to prove either the existence or the execution of the scheme to defraud the Pension Fund charged in the indictment, or for that matter, any scheme to defraud the Pension Fund"; and (6) ". . . an intense study of the record convinces me that this prosecution was designed to charge a sprawling, amorphous scheme and conspiracy in order to allow the presentation of a series of confusing, complex transactions and to abet the introduction of a mass of immaterial, prejudicial evidence." (App. A, *infra*, pp. 59a-67a).

II. Communications From Trial Judge to Deliberating Jury in Absence of All Petitioners and Their Counsel

On the evening of the first day of the jury's deliberations, the trial judge, while in chambers, received a written communication from the jury delivered by the Marshal in charge of the jury. (III D.A. 2178). The communication was in two pages, the second of which merely listed the names of the jurors. The first page, signed by Foreman Gogerty, is reproduced in full:



(III D.A. 2179-2180).

In response to this communication, the trial judge, via the Marshal, sent the jury a copy of the indictment with the oral instruction to them (III D.A. 2180): "This is all that they are going to get." This action was taken without notice to the parties or their counsel (III D.A. 2229), although the Court had promised to notify counsel in the event of any inquiry from the jury. (Tr. 16521-22).

The copy of the indictment was unexpurgated. It contained the seven counts not submitted to the jury. It further contained allegations, incorporated by reference in all counts, of a breach of trust by Petitioner Hoffa on which there was no Government proof.[5] (Defendants' Ex. 6 of August 17, 1964; Tr. 15294). Those allegations referred to a separate and independent "judicial proceeding" in which petitioner Hoffa was "being questioned . . . [about] a breach of his fiduciary duties" in the handling of his union's funds.[6] (Count I, par. 4(c); I D.A. 44). The Court had excluded proffered evidence to this effect and had previously ordered that this part of the indictment not be read to the jury. (Tr. 15293-94).

The jury which had retired on July 24, the day they got the unexpurgated indictment and an instruction

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[5] The copy of the indictment also had ambiguous markings on it, including arrows drawn to the name of Petitioner Hoffa. (III D.A. 2173-2175, 2231). Neither the trial judge nor the marshal made the markings; but whether they were on the copy of the indictment as received by the jury remains uncertain. Neither the trial judge nor the Marshal examined the copy before its delivery to the jury. (III D.A. 2174, 2175, 2230).

[6] Over petitioners' objection (III D.A. 2153), the Court instructed the jury:

> "One using a fiduciary position, a position of trust, to obtain benefits is not only performing a breach of trust but is performing an active fraud." (III D.A. 2141; Tr. 15,281, 15,368; G.A. 226-227).

they would get no more, continued their deliberations until July 26 when the verdicts of guilty underlying the petitioners' convictions were returned. After the jury verdicts, Petitioners first learned of the trial judge's *ex parte* communication to the jury.[7] Motion for new trial on the ground of that communication was denied. (III D.A. 2171-2173, 2178-2180, 2239, 2243).

The majority of the Court of Appeals held that the trial judge's communication to the jury in the absence of petitioners and their counsel, although "not good practice", was "not prejudicial." (App. A, *infra*, p. 26a). The dissenting judge: (1) saw "plain error" in the trial judge's action "although the majority does not recognize [it] as error"; (2) doubted the need to

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[7] On July 26, but prior to the return of the jury verdicts, the same marshal who had acted as the trial judge's emissary on the indictment communication was called by the Court as its witness and examined by the Court as to jury communications "in the last two days" (Tr. 16582). The marshal told of telephoning the trial judge on July 25 and reading him a note from the jury foreman. The note stated the completion of the jury's ballot on Count I, and asked advice "as to the disposition of these papers as we finish with each count." (Tr. 16580). The marshal further told of being instructed by the trial judge "to tell the jury foreman to keep these papers with him at all times." (Tr. 16580). However, the marshal did not relate what conversation he had with the foreman or other members of the jury in orally transmitting the trial judgment's instruction. So the petitioners learned *only that much* of this further *ex parte* action by the trial judge done on July 25 out of their presence and without notice to them or their counsel. The petitioners further learned from the marshal as the Court's witness that the jury had that day, July 26, given him a menu for their lunch, and a "get well" card to mail to a juror's sister. But, with the Court's limiting the inquiry to the "last two days", i.e., July 25 and 26, the marshal said nothing regarding his delivering the copy of the indictment and the trial judge's message to the jury on July 24. (III D.A. 2171-2172; Tr. 16579-16583).

show prejudice for reversal, "since the error committed was of constitutional proportions"; and (3) in any event found that the record does not negative but affirmatively shows a reasonable possibility of prejudice to petitioners necessitating reversal. (App. A, *infra*, pp. 42a-43a).

III. Receipt by Jurors During Trial of Prejudicial Newspaper Statements and of Statements by Some Jurors Not Presented in Open Court

After jury verdict but before sentencing, the defense moved for a new trial or inquiry of the jurors on the basis of the testimony of an alternate juror named Paré. (III D.A. 2181, 2212, 2213-5). The events testified to by Paré first came to the attention of the defense when Paré, on his own initiative, sought out defense counsel after jury verdict. (III D.A. 2187). Paré had been excused as an alternate juror when the jury retired for its deliberations. All of the events testified to by Paré occurred during the progress of the trial, but before submission of the case to the jury. A summary of those events follows.

Six or seven jurors were sitting around in the day room at the Great Lakes Naval Station where they were sequestered. Juror Gogerty, later elected foreman of the jury (III D.A. 2179), crossed the room to Paré and handed him a newspaper clipping which puror Gogerty took from his wallet. Paré read the article and returned it. (II D.A. 2201).

The article, set out in full at I D.A. 311, was about the case, and was headlined: **Hoffa Turned Down on 2d Acquittal Plea.** It began with:

> "James R. Hoffa, president of the Teamsters union, lost a second bid for a judgment of acquittal

yesterday in his 25 million dollar fraud trial in federal District Court.

"Hoffa's attorneys first sought an acquittal two weeks ago after the government had rested its case, but the move was denied by Judge Richrad [sic] B. Austin."

The article went on to describe the unsuccessful argument of Petitioner Hoffa's counsel in support of the rejected "second bid for a judgment of acquittal" as one made "in contending his client is innocent," and based on a contention "that Hoffa's testimony on the stand . . . was sufficient proof that he acted in 'good faith.'"[8]

The article concluded with a report of the trial judge's barring from evidence of two letters offered by the Government to discredit the testimony of petitioner Dranow. The article's description of the letter was:

"In one of the letters, Dranow wrote that he was sorry for the troubles and would take the blame. In the other letter, he asked for a $60-a-day payoff from co-defendants and other associates."

The letters, according to the article, were excluded by the trial judge "inasmuch as [they] tend to be prejudicial against the other defendants."

At the trial, and before the trial judge's exclusion of the two letters, petitioner Dranow had admitted they were in his handwriting. (III D.A. 1915; G.A. 196). The Government's questioning showed that in

[8] The proceedings on the two rejected motions for judgment of acquittal had, of course, taken place out of the presence of the jury.

the one letter, written at some unidentified time and addressed to some unidentified person, petitioner Dranow was offering to take the blame for some unidentified "everything" in order to protect some unidentified "others" (III D.A. 1914); and that in the other letter, written at some unidentified time and addressed to some unidentified person, petitioner Dranow was requesting payments of ten or fifteen dollars a day each from six named sources, three of them being the names "George Burris", "Sam Hyman", and "Cal Kovens", but with no description or identification of them as defendants in this proceeding. (G.A. 195). Petitioner Dranow could not recall in what connection he had written the two letters. (III D.A. 1915; G.A. 197).

So much and no more was developed in the presence of the jury. And the trial judge, *without connecting petitioners to the letters,* instructed the jury to disregard the letters and all testimony concerning them. (III D.A. 2065-6).

Besides the newspaper article in the possession of juror Gogerty, other information reached the sequestered jury from an outside source. Juror Gogerty remarked to other jurors that petitioners Strate and Hoffa "were in cahoots in Puerto Rico." (III D.A. 2199, 2205, 2190). The evidence in this conspiracy trial provided no basis for juror Gogerty's statement.[9]

Finally, according to alternate juror Paré's testimony, various jurors during the course of the trial made many statements to other jurors concerning the

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[9] While the jury was sequestered at the Great Lakes Naval Station, articles appeared in the Chicago daily newspapers which concerned Hoffa, Strate, and Teamster Union problems in Puerto Rico (I D.A. 316-326).

trial, the evidence, and the guilt of defendants. Among such statements were the following. On two or three occasions when events in the courtroom suggested cross-purposes among the defendants, juror Bernier said: "There is no honor among thieves." (III D.A. 2192; 2190). On another occasion juror Doughton added:

> "If I had a million dollars, I sure wouldn't let Hoffa get ahold of it. Might never see it again." (III D.A. 2193).

On still another day, juror Siers felt that "those guys", including petitioner Hoffa, "won't look me in the eye", and concluded that "they know their goose is cooked or at least in the frying pan." (III D.A. 2193; 2190). Juror Gogerty added that "you can't tell me Hoffa didn't know about" a failure to put up debentures for a Pension Fund loan. Juror Gogerty further deduced: "Dranow now sets it up, Burris does the papers, Kovens gets the construction work. That's got to be conspiracy somewhere." (III D.A. 2193-2194, 2190). And juror Gogerty concluded that petitioner Hoffa, unlike Reuther or Meany who are "tough" but "straight" or "honest", "has been in trouble right from the start." (III D.A. 2194, 2190). Juror Gogerty followed up those remarks a few days later with: "These bastards live their lives robbing people, parasites"; while Juror Bernier informed his fellow jurors "we spend all our damn time here, and they just appeal this thing." (III D.A. 2194-5, 2190).

All of the foregoing statements by jurors were made prior to submission of the case to the jury.

The trial judge accepted as true all of the foregoing events testified to by juror Paré, without cross-exami-

nation, impeachment, or any response by the Government. (III D.A. 2212, 2217). Nevertheless, he denied both a new trial and any inquiry of the jurors. (III D.A. 2212, 2215).

The Court of Appeals found no error because: (App. A, *infra*, pp. 29a-30a)

> "There was no evidence of any outside influence on the jury and from Paré's testimony, it appears that, for the most part, the jurors followed the Court's admonition not to discuss the case among themselves until the case was finally submitted to them for decision. We think, under all of the circumstances present, that these matters brought to the attention of the trial judge after verdict were not sufficient to require an inquest by the Court or the granting of a new trial . . .".

IV. Combination of Pre-Trial Publicity, Inadequate Voir Dire To Determine Prejudice Resulting From Such Publicity, the Availability to the Jury of Excluded Prejudicial Evidence, and Sequestration of the Jury on a Military Reservation

On March 4, 1964 in Chattanooga, Tennessee, petitioner Hoffa was convicted of jury tampering. Less than two months later, on April 27, 1964, petitioners' trial in Chicago began. (I D.A. 14).

During the period preceding the trial, the Chicago newspapers featured numerous stories about petitioner Hoffa. In particular, just two weeks before the trial started, on Sunday, April 12, 1964, the front page of the Chicago Sun-Times, a newspaper of wide general circulation, bore a two-line lead headline across the entire front page: "Alleged Hoffa Plot Told On Life of Bob Kennedy", followed by a lengthy article about one Edward Partin's allegation that petitioner Hoffa planned to assassinate Robert Kennedy, the then

Attorney General. Partin was a paid informer for the Justice Department. (P. Ex. A 4).[10]

On April 26, 1964, the day before the trial commenced, the same newspaper carried another story approximately one-half of which was devoted to the Chattanooga trial and the alleged assassination plot. (P. Ex. A 15-16).

While the jury was being selected, there was mounting newspaper coverage of the alleged plot to kill Robert Kennedy. This was climaxed on May 1, 1964, when the then Attorney-General came to Chicago. During this visit Kennedy made statements, reported in both the Chicago Sun-Times and The Chicago American, which treated these allegations as acknowledged threats of serious personal danger. (I D.A. 470; P. Ex. A 5-6).

On May 5, 1964, Look Magazine published a highly inflammatory story about Partin and the alleged plot. (P. Ex. A 17-21). Soon after this, Life Magazine published a similarly sensational article on the same subject, supposedly written by Partin, which emphasized that the Kennedy children were also to be killed. (P. Ex. A 22-35).[11] While these articles were being distributed and sold—even in the Courthouse lobby—prospective jurors were free to come and go, obviously exposed to these prejudicial influences. (I D.A. 490).

When the petitioners' attorneys attempted to determine the effect of this prejudicial publicity, the trial court so limited *voir dire* that they could not make

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[10] "P. Ex. A" references are to the Publicity Exhibits Appendix lodged with this Court.

[11] These magazines were distributed about two weeks before the dates shown thereon.

intelligent use of their peremptory challenges. Questions which were designed to determine whether a prospective juror had political sympathies toward the Kennedy family, or their political party, were excluded because they were not addressed to opinions at the time of trial. (I D.A. 470, 407, 432, 434-436, 440, 467).

The same reasoning was used to prohibit inquiries into what the jurors had read about the case and petitioner Hoffa (Tr. 1657, 1662), whether a juror had any sympathies or antagonisms toward unions (Tr. 1664-1665, 1670), and whether a juror had read about other Hoffa trials. (Tr. 1926). Even when a juror admitted having read editorials about petitioner Hoffa, the trial court would not permit further questions to determine the effect of such editorials, and whether the juror had ever expressed an opinion as to petitioner Hoffa. (Tr. 1333-1335).

Instead of giving the jury careful instructions about publicity or allowing reasonable *voir dire,* the court, over the objections of all petitioners, ordered that the jury be sequestered, even though petitioners offered to waive any objection based on prejudicial publicity. (I D.A. 355-358).

On May 13, 1964, when the publicity about the Chattanooga jury-tampering conviction and the alleged assassination plot was still fresh, the jury was moved 36 miles from its downtown hotel to the military base at the Great Lakes Naval Station, where they were lodged for the duration of the trial. (I D.A. 573-575). Again, petitioners' objections to this action were overruled. (I D.A. 580).

The sequestration did not serve to insulate the jury from improper influences. Two prejudicial letters

which had been excluded from evidence were summarized in the July 18, 1964, issue of the Chicago Tribune:

> "In one of the letters, Dranow wrote that he was sorry for the troubles and would take the blame. In the other letter, he asked for a $60-a-day payoff from co-defendants and other associates." (I D.A. 311).

This article, headlined **"Hoffa Turned Down on 2d Acquittal Plea"**, was displayed in the jury-room by the jury foreman. Although petitioners Hoffa and Strate were not mentioned in the letters, the article suggested that petitioners Hoffa and Strate were among those from whom Dranow demanded a "pay-off." The article also stated that the trial court had overruled petitioner Hoffa's motions for acquittal, and rejected his contention that the evidence proved his "good faith." (I D.A. 311; III D.A. 2201-2203, 1910-1915, 2059). For detail, see pp. 21-23, *supra*.

Equally prejudicial information reached the jury during its deliberations. Without the knowledge of petitioners, or their counsel, and in their absence, the Court sent a copy of the indictment into the jury room. The fourth paragraph of the indictment cited a separate and independent "judicial proceeding" in which petitioner Hoffa was "being questioned . . . [about] a breach of his fiduciary duties." (Par. 4c of instant Indictment; I D.A. 44). Although the Court's sending of the Indictment to the jury, in effect, constituted the complete reversal of an earlier ruling, the Court did not inform defense counsel of its action until after the verdict had been returned. (III D.A. 2172-2177). For detail, see pp. 18-20, *supra*.

V. Impeachment of Petitioner Hoffa, by Use of a Conviction, Particularly One Which: (1) Was, and Still Is Not Final; (2) Was for an Offense Subsequent in Time to the Offenses Charged Here; and (3) Was Obtained for Use at This Trial by the Government's Manipulation of Indictments, Trials, and Charges

Just before presentation of petitioners' case, defense counsel sought a ruling from the trial judge on whether the Government would be permitted in cross-examination of petitioner Hoffa as a defense witness to bring out a jury-tampering conviction which was then on appeal to the Sixth Circuit Court of Appeals. (Tr. 13587-13590; G.A. 187-189). Adversely to Petitioners' contentions, the trial judge ruled that he would permit such cross-examination. (Tr. 13589-90, 13711; G.A. 189-190). Petitioner Hoffa did take the stand as a witness for the defense; and, in accordance with the trial judge's prior adverse ruling, he did on cross-examination admit the fact of the jury-tampering conviction then on appeal to the Sixth Circuit Court of Appeals. (III D.A. 2001).

Thereafter, defense counsel unsuccessfully objected to the trial judge's instruction concerning the jury-tampering conviction "consistent with the objection . . . originally made about its admissibility, since it was on appeal." (III D.A. 2166; Tr. 16561-2). And the prosecutor in his argument to the jury made several prejudicial references to petitioner Hoffa as "a jury tamperer" unworthy of belief. (III D.A. 2092-4).

The jury-tampering conviction used to impeach petition Hoffa was for events charged to have occurred in the Fall of 1962 when he was on trial in the "Test Fleet case."[12] All of the substantive offenses and the

[12] See generally this Court's opinion in *Hoffa* v. *United States*, —— U.S. ——, 87 S. Ct. 408.

material facts of the conspiracy in the present proceeding are charged to have occurred from 1958 to 1961, or from nine months to several years prior to the events of the jury-tampering charge. (I D.A. 41-77). Nevertheless, the Government succeeded in delaying the trial below until completion of the jury-tampering trial where the Government had a secret informer, one Partin,[18] to assure the jury-tampering conviction, thereafter used here to help convict petitioners by impeachment of petitioner Hoffa.

We summarize the course of the Government's actions in getting trial of the jury-tampering charges before trial of the present indictment. The indictment for jury tampering was filed in May, 1963, a few weeks before the filing of the present indictment in June, 1963. However, the present indictment was in large part a successor indictment to one filed against petitioner Hoffa in the Federal Court at Orlando, Florida, almost two years earlier in October, 1961. Efforts by petitioner Hoffa in 1962 and 1963 to secure trial or dismissal of the Orlando predecessor indictment were resisted by the Government until the filing of the jury-tampering indictment and the present indictment. The Government then secured dismissal of the Orlando indictment on the ground of the filing of the present indictment. (I D.A. 345-347).

Upon arraignment on the present indictment in June, 1963, all petitioners requested an immediate trial, and offered waiver of all pre-trial motions to get one. Thereafter petitioners repeatedly moved for an immediate trial, until January, 1964, when the jury-tampering trial in Chattanooga started. But the Gov-

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[18] See fn. 12, *supra*.

ernment successfully resisted all of the petitioners' efforts with its insistence on trying the jury-tampering case first—although only petitioner Hoffa of the seven petitioners here was involved in it. (I D.A. 131, 342, 343, 344-346, 348-351 364-368).

The jury-tampering conviction was on appeal to the Sixth Circuit Court of Appeals when petitioner Hoffa was impeached (III D.A. 2001), was pending before this Court on certiorari granted when the Court below affirmed the conviction in this proceeding,[14] and was thereafter affirmed by this Court[15] with petitioner Hoffa being granted until February 4, 1967, to file his Petition for Rehearing.

At this time, the jury-tampering conviction is further subject to petitioner Hoffa's appeals from the trial judge's denials without hearing of his two post-trial motions for new trial. Those appeals are now before the Sixth Circuit Court of Appeals (*Hoffa* v. *United States,* No. 16567 and No. 16991) with all briefs filed and oral argument set for February 7, 1967. One of those appeals presents the question, in no way foreclosed by this Court's decision in *Hoffa* v. *United States* U.S. , 87 S. Ct. 408, whether the jury-tampering conviction is invalid under the Sixth Amendment because the Government intruded on the defense

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[14] As "additional reason" for its holding of no reversible error, the majority of the Court below relies on the fact that defense counsel did not object when the prosecutor asked petitioner Hoffa about the jury-tampering conviction. (App. A, *infra*, p. 28a). But that, of course, was after the trial judge's adverse ruling permitting the question, and there was no point in prejudicing petitioners further by making a second and formal challenge in the presence of the jury. See p. 29, *supra;* and App. A, *infra*, pp. 34a-35a.

[15] *Hoffa* v. *United States,* —— U.S. ——, 87 S. Ct. 408.

of the jury-tampering charge by use of a secret informer, one Vick, who as an employee of defense counsel learned defense strategy which he reported to the Government.

VI. Prejudicial Trial Errors in Violation of Governing Statute, Rule, or Due Process Clause, Which Denied Petitioners a Fair Trial

A. Non-public selection of petit and grand jury

Section 1864, Title 28 U.S.C., provides in part:

> "The names of grand and petit jurors shall be publicly drawn from a box * * *".

Here, in the selection of the petit jury panel, the Clerk and Chief Deputy alternately drew names from the jury box until the required number of names was obtained. (I D.A. 374). The names were never called out publicly, nor revealed, even upon request, during the drawing. Indeed, defense counsel was present at the drawing and requested that the names be announced, which request was denied. (I D.A. 371, 374-382). The cards containing the names drawn were handed to an office clerk. The Clerk testified that thereafter the office clerk privately prepared a list of the names from the cards, and that the list was used for summoning the jurors.

As the Clerk admitted, there could be no evidence, proof or safeguard that the list was composed of the names drawn from the box except the assurance of himself and the office clerk. (I D.A. 375, 379). Therefore, there was no independent and public assurance that the jurors summoned were the jurors whose names were drawn.

The foregoing practice was pursuant to an order of the Court, entered without notice to petitioners, which

expressly directed the Clerk not to disclose the names of any person so drawn to any party, the marshal or the Court until the jurors were seated in the jury box. (I D.A. 117, 120, 374). The same practice was employed in the selection of the grand jury panel. (I D.A. 378, 393, 481).

The Court of Appeals held that the statute "does not require * * * that the names must be read aloud", or otherwise published. (App. A, *infra*, p. 19a). The Court of Appeals thought it sufficient that: "No efforts were made to keep secret the fact that a jury was being drawn." [16]

B. The removal of a juror and replacing him by an alternate, without ascertaining whether the removed juror had become unable, or disqualified, to perform his duties

After the close of the Government's final argument, the trial court advised petitioners that the 92-year-old mother of juror Lee had fallen, broken her hip, and had major surgery the day before. The juror was told that his mother came out of the operation very well. He did not request discharge from the jury. (III D.A. 2106). The doctor advised the marshal that the mother was doing very well, but that due to her age she could suffer a relapse at any time. Although there was no actual way of telling, the doctor doubted that she would ultimately leave the hospital alive. (Tr. 16404). But he did not expect her to die in the immediate future. (III D.A. 2106).

The Court advised petitioners that unless they unanimously agreed to proceed with eleven jurors in the

[16] Since trial of this case in the Spring of 1964, the District Court has required that the names be publicly announced when drawn.

event Lee's mother died, he would substitute an alternate before the jury began its deliberations. (III D.A. 2095). Petitioners declined so to agree, and requested that inquiry be made of the juror as to the state of his feelings in the matter. They objected to his removal without such inquiry of him. The Court refused inquiry, and replaced the juror. (III D.A. 2097). The juror's mother did not die before the jury reached its verdict.

C. Trial court's instructions as to inaudible testimony

Francis Murtha, Executive Secretary of the Pension Fund, was called as a Government witness, and testified at length. (Tr. 4476-4761). Shortly after the commencement of the Government's direct examination of Murtha, the trial court announced the following rule:

> "The Court: Let me say to the jury, in case this witness—it may help them—any time you can't hear what he says, this may encourage him to speak louder. The answer is in the affirmative. So you [prosecutor Smith] frame your question accordingly, and we will know who will be penalized by that.
>
> * * *
>
> "The Court: I mean, any time he doesn't answer in the affirmative, I have instructed the jury to assume—any time they can't hear him, I have told the jury that they may assume he is speaking in the affirmative. Because he only drops his voice on certain occasions, see.
>
> "Mr. Walsh: Oh, I object to that, Judge.
>
> "The Court: I know you object to it.
>
> "Mr. Walsh: I don't understand how you can assume what he testifies to.
>
> "The Court: Because the only time he drops his voice—well, I won't say it either. But that is the rule from now on.
>
> "Mr. Smith: Yes, sir." (Tr. 4556-4558).

Later in Murtha's testimony, the following occurred:

> "Q. And what does it relate to, Mr. Murtha?
> "A. It relates to the Connell Buildings with respect to, I believe, the constant payments or something. I haven't read the thing.
> "The Court: I can't hear it, the jury can't hear it, Mr. Bellows can't hear it. We will assume that it is adverse to the Pension Fund if you don't keep your voice up.
> "Mr. Walsh: To which we will object." (Tr. 4627).

The Court of Appeals made no reference to petitioners' contention of reversible error in the foregoing instructions by the trial court to the jury on the testimony of the witness Murtha.

D. The Jury Instruction That One Using a Position of Trust To Obtain Benefits Is Performing An Active Fraud

In this mail fraud case, the trial court, over the objection of petitioners (III D.A. 2153), instructed the jury as follows:

> "One using a fiduciary position, a position of trust, to obtain benefits is not only performing a breach of trust but is performing an active fraud." (III D.A. 2141; Tr. 16505).

The evidence in this case showed that various petitioners had economic relations with each other or with others. The jury could have understood any of these relations to be fiduciary relations.

Further, the Court's sending of the indictment to the jury (see *supra*, pp. 18-20) informed the jury that petitioner Hoffa's actions as an officer of his union were being elsewhere questioned in a federal judicial

proceeding "as a breach of his fiduciary duties." (Indictment, Count one, par. 4(c)).

The Court of Appeals found no error in the foregoing instruction. (App. A, *infra,* p. 31a). However, the majority opinion does state that the jury could have regarded petitioner Hoffa's "connection with Sun Valley * * * as a violation of his fiduciary duties to the beneficiaries of the Teamster Pension Fund." (App. A, *infra,* p. 14a).

VII. Failure of the Court To Conduct a Hearing as to Petitioner Dranow's Mental Competency To Consult With His Attorneys and To Stand Trial

Since before the indictment was returned in this case and to the present time, petitioner Dranow has been serving sentences on Federal convictions for mail fraud, income tax evasion and bail-jumping. He was therefore not readily available to his attorneys for consultation until shortly prior to trial. He was represented by attorneys Jacques Schiffer of New York City and Frank Ragano of Tampa, Florida.

From the very inception of the pretrial proceedings, irrational conduct by petitioner Dranow was brought to the Court's attention. At arraignment, he would not enter a plea. (Tr. 6/25/63, p. 7; Tr. 7/15/63, p. 4). On June 25, 1963, his attorney informed the Court of Dranow's complaint of a visit to him in prison by Justice Department agents requesting him to give perjured testimony at the trial. Counsel stated that Dranow "is virtually half insane." (Tr. 6/25/63, pp. 23-24). Even Government counsel early informed the Court that the Government feared a conflict might arise between Dranow and his counsel. (Tr. 7/15/63, pp. 10-20).

In late March, 1964, the Court received a letter from Dranow, who was then in prison at Leavenworth, Kansas, complaining of his physical condition. (Tr., 3/30/64, pp. 7-11). In early April, 1964, Dranow was transferred to Chicago for the impending trial. Due to Dranow's physical condition, he was later transferred to a jail with more satisfactory facilities. (Tr., 4/6/64, pp. 126-146; Tr. 4/9/64, p. 3).

Prior to commencement of trial, on April 27, 1964, counsel informed the court that: (1) Dranow had been unable to confer intelligently with counsel; (2) Dranow had informed them that he was not physically or mentally capable of aiding and assisting in the preparation of his defense; (3) Dranow could not speak coherently; and (4) they were of the belief that Dranow could not intelligently aid and assist counsel in the preparation of his defense. They requested that the Court have Dranow examined by doctors to determine "whether or not he is mentally capable of assisting counsel in the preparation of this case." (Tr. 3-5).

Government counsel requested that, if formal papers were filed showing sufficient basis for the Court to order a hearing, the Government then be afforded an opportunity to have Dranow examined by doctors selected by the Government. The Government also suggested that the Court select an impartial psychiatrist to act in the matter. (Tr. 12). Dranow's counsel requested that the Court, on its own motion, have Dranow examined. Dranow's counsel stated that they hoped to secure written reports from doctors who had examined and treated Dranow. (Tr. 13). During this conference, Dranow's counsel told the Court that a doctor who had attended Dranow had indicated to him by telephone that Dranow had a "very serious

mental aberration" as well as "many, many things wrong with him physically" (Tr. 15), and that he "is in a very, very serious condition both mentally and physically." (Tr. 16). The Court did not select a doctor, but suggested that the Government and defense have Dranow examined. (Tr. 17-18).

At this conference, Dranow's counsel also told the Court that Dranow had vacillated on whether he wanted them to represent him, and requested that the Court determine from Dranow whether he desired that they continue to represent him. (Tr. 16). Dranow was brought into chambers and, in response to a direct question, stated that it was satisfactory for Ragano and Schiffer to continue their representation. (Tr. 21).

The next day, April 28, 1964, the Government, pursuant to oral motion by Dranow's counsel on the previous day, submitted to the Court a proposed order to appoint three doctors selected by the Government to examine Dranow on the following day. (Tr. 282-284). Dranow's counsel requested that the examination be deferred until after reports had been received from the doctors who had previously examined and treated Dranow. (Tr. 284, 287-288).

At this conference in chambers, Dranow's statements and conduct were not only irrational, but he also exhibited an unwillingness to cooperate with his counsel. Dranow refused to be examined in a hospital, stating (Tr. 289-291):

> "* * * I think that I should be examined either here in a room or in a place where I am not to be shackled and carried around the streets again to some unknown, strange place and be frightened. * * * I would like to be examined either here in

a private room or in the jail where I am. I don't want to be dragged through the streets with the marshals, who made a mistake. They shouldn't have pulled me here or made a mistake. They put chains on. Don't do this, their boss told them. Don't dare leave me without shackles. I don't want to be carried around and I don't want to go to a strange new place and get mixed up and frightened again.* * * I wouldn't want the doctors that examined me to be present when the other doctors are examining me because I don't want them to carry the lies the previous doctors did. The record of my condition is in the jailhouse, in the prisons where they have my record. We don't need any theatricals and some classy doctors getting up trying to tell everybody that this guy is in perfect health. Dranow's doctors are crazy, and they will make another spectacle out of me like Jack Ruby. I don't want this hitting my head against the wall. I want to be examined where I am or here and not dragged around. * * * *And I am not crazy,* your Honor, and there is nothing the matter with my mind. I am weary, that is all. (Emphasis added)

"The Court: I understand.

"Defendant Dranow: And I tell you this, that you are worrying about your precious case, and I am worrying about the little precious life I have got, and you must respect that little life that I have left.

"The Court: I think I have done everything I could in that regard.

"Defendant Dranow: Yes, except the officers and the people in charge of me do not respect your wishes and do not carry out your orders. It is just a sin for them to tease me and provoke me and use derisive laughter and scoff at me more to show that they don't care for the Court, they don't

care for anyone. They are God. They can violate the rules.

"The Court: What is your suggestion, Mr. Schiffer and Mr. Ragano?

"Mr. Schiffer: Well I personally feel there is something wrong and this man is in some kind of a mental aberration.

"Defendant Dranow: *There is nothing wrong with my mind* and I am telling you that and I don't want any time off. I want a rest for a few days so that I can go to trial, and I should have been resting now to go to trial." (Emphasis added)

In response to a suggestion by attorney Schiffer that Dranow was deranged, Dranow interrupted (Tr. 293):

"Please don't use that word. *There is nothing the matter with my mind.* I told you that two years already and I don't want to have to tell it to you—" (Emphasis added)

Dranow denied that he had really been examined by the other doctors, saying (Tr. 295-296):

"Your Honor, please bear with me. They make me look out that I am a pest and harass you and I annoy you. No doctor in the Cook County Jail examined me. A doctor came there. I was seeking my pills. He came without one of those what you call probers. He came without a blood pressure instrument. He told me to take my pants down and he put a finger there, they put a finger there, and he told me, what am I complaining about.

"I said that all I wanted were my pills. The whole thing took two minutes. He never examined me. Still, my lawyer comes out and tells me yesterday that you said that I was in good health

because the doctor told you so from Cook County Jail.

"Mr. Ragano: Let's get the record straight. Yesterday I reported to my client and informed him that your Honor had some sort of a report where he was examined three weeks ago.

"The Court: I showed it to you.

"Mr. Ragano: And I reported it to him and he informed me that that doctor did not examine him at all.

"Defendant Dranow: He was just looking to see if I really had a hernia. I said, 'My hernia don't hurt me. I am only seeking my pills. I don't complain from the pain.' "

Dranow also imagined that the doctors were leaving needles in him, saying (Tr. 297):

"And that my own doctors are present, and I don't want them to put any more needles in me. I don't know what the needles are that they are putting into me. I don't know what they need to take needles for. The prisons took a hundred needles out of me."

Dranow declined to make a fast decision as to whether he would submit to an examination at the hospital. He also commented with respect to his decision of the previous day as to continuing with his counsel: "I can't make decisions fast, like you brought me in yesterday and you said, 'Yes or no?'—" (Tr. 298).

Dranow's counsel stated to the Court (Tr. 298-299):

"That is why I say, Judge, that he doesn't understand, mentally, and precisely what your Honor is indicating to him, and since he can't even understand what your Honor says to him now,

this man is in no condition to want to go to trial. Up to this point I don't think I have yet received from Mr. Dranow, despite the number of times we sat together with Mr. Dranow, what his defenses are to this case, and 50 percent of what he has told me has disappeared from his memory now, and I am trying to search his memory again to find out what his defenses are here."

The Court ruled that he would defer the examination until after Dranow had filed his affidavits and medical reports. Dranow then volunteered a promise to the Court "never to make an outburst in the courtroom." (Tr. 299).

On the following Friday, May 1, 1964, during the selection of the jury, Dranow asked to make a statement to the Court. (Tr. 908). The following took place in chambers (Tr. 909-924):

"Defendant Dranow: * * *

[F]irst of all, I wrote a letter to you and I read part of it, part of it—

"The Court: Without regard to the letter, can you tell me why you want to talk to me today?

"Defendant Dranow: Well, I trust you will allow me to refer to my notes as I am not in a position to match wits either with the prosecution or the Court who I don't understand fully.—

"The Court: First of all, you are not going to be questioned in here. You are in here to make a statement. And I don't think that—

"Defendant Dranow: Yes. I would like to have time to refer to my notes—

"The Court: I don't think you are going to have to match wits at this moment with anybody, Mr. Dranow.

"Defendant Dranow: I would like for the Court to know my situation.

"The Court: All right. Go ahead and proceed.

"Defendant Dranow: I have incurable heart disease * * *

"Under the care of Dr. Meyer, who you so graciously afforded me, I am improved. I do not need any government doctors to examine me, to ridicule me, humiliate me; *nor will I allow my attorneys, if I am living or breathing yet, to make any reference to me being insane, to me being disconnected from my faculties, or to me not being ready for trial,* [Emphasis added] despite the fact that everyone involved was derelict in their duty to give me the proper safeguards to see that I was ready for trial, and have placed in my path every obstacle to become ready.

"The prosecution—who I warn your Honor you must regard with great suspicion; anything they tell you—have told you I was examined and I was in good health. They told you there is no room in the Wheaton Jail and I find they have an occupancy of 25 per cent, which fell down to 10, 15 per cent this week.

"And so they are allowed to poison his Honor's mind. And while I don't seek or it is not my purpose to cause your Honor to have antipathy towards them, I do want you to recognize the fact that it appears ridiculous to me that Mr. Poretz to say that he didn't know about this, or he didn't know about this, and the Marshal didn't know what the Judge said, and the Marshal forgot to tell it to his superior. And his superior keeps the comedy of error going on, and disconnects me from my faculties, and causes situations and causes discord, disharmony between me and whatever counsel I might have.

"And after all there was to do—and I do timely notify the Court and your Honor that I am going to be leaving in two weeks, April 6th, on your writ to produce me, and apprise the Court of my condition—regardless, I was put in chains and shackled to my handcuffs where I couldn't get to my pills, and forced to travel two days, in the jail house, out of a jail house, always in belly chains and shackles.

"So if I needed a nitro, my precious nitro, life-giving nitro, I couldn't get it to my mouth because I was shackled in chains.

* * *

"I don't want to seek either—or be the object of ridicule or sympathy. I am a person who gave charity all my life. I seek no one's charity to buy me a suit because the prison turned me out with zipperless trousers, and because the Cook County Jail took the pins from my trousers because they were a dangerous weapon, and I had to appear in my court with my only source of concealment, holding myself like this, so I can conceal myself, without a lawyer properly notified, never before two minutes before the trial having a confidential conversation with my lawyer.

"I am produced in front of lawyers for my co-defendants, lawyers for the government, marshals—a room full of my enemies, all people that Mr. Poretz made me feel suspicious about. He has filled me with suspicion about my attorney; he has filled me with consternation, apprehensive—can I believe what my attorney tells me?

"And so, gradually, he wrecked what belief I had in my attorney. I didn't believe the doctor they brought me. I thought the pills they gave me would poison me, because he filled me with apprehension.

"The other day you told me to confine myself to handcuffs on the stand, your Honor. He was not satisfied that I obeyed your wishes, but he says, 'Now, Mr. Dranow, you were in prison before you got here.' The jury wasn't there. There was no jury there. Who was he trying to show off for and disobey your orders, that I obeyed obediently? But he wanted to expose me to more humiliation, and take part in the yellow journalism that he fosters right now outside.

"He talked to Claude Molenhoff for a half hour before the schedule so he could tell him all the filthy dirty lies that are not true about us.

"I went through three, four trials with this band of political thieves. I can tell you about them, your Honor. You must listen to me and have judicial conscience, listen—

"The Court: To the point—

"Defendant Dranow: Here is an indictment—

"The Court: First of all, Mr. Dranow, I want to know why you want—what you want to tell me other than what you have told me. I mean, what—

"Defendant Dranow: First of all, about this indictment—

* * *

"This indictment is part truth and part lies; part truth—it's all lies, and you know it's all lies—

"Mr. Ragano: Mr. Dranow, now, we can't go into the indictment—

"Defendant Dranow: Now, I want to maybe try and save the case—many of these things are true, and maybe you may sign a stipulation to follow the Judge's wishes for speed, and agree so they don't march thirty, forty, fifty meaningless witnesses in here to create their television atmosphere for show, things we would gladly admit to.

"Mr. Ragano: Mr. Dranow, this is not a matter to be taken up with the Court at this time. This is a matter of law to be taken up in due course of time.

"Confine your remarks to whatever you want to tell the Court.

"Defendant Dranow: I will tell him one more final thing. That's all I know—that the Court has been very kind and gracious and stood for me. And if I act like I'm abusing anybody, believe me, I only tell you what's in my soul and what's in my heart.

"I have seven co-defendants. Many of them are aged men. They wear earphones. I can't allow the Judge not to know that when he says, "I sentence you to the custody of the Attorney General of the United States," that he is sentencing my friends to the custody of a sadist whose venomous hate for one of the co-defendants is the reason that we are here. They seek a crime to fit the punishment. *I don't want my lawyers to say I'm crazy or insane.* [Emphasis added]

"The Court: They haven't said so yet and, apparently, because this is Friday, they don't intend to file a petition because I anticipated it would be filed by this time.

* * *

"Let me say, there has been no proper notification of me about any ill health or ill mental health regarding you by anybody.

"Defendant Dranow: This is to be final. I have many things I have written to you and told you about. I have no doubt of the veracity of what I tell you, because I now keep an account of everything.

* * *

"I'm not going to allow the lawyers to say that I am sick or I'm insane, and to cast any questions

on anybody's mind. You already can see that I'm not insane from my talk with you. [Emphasis added]

"Mr. Schiffer sat there and said that I am disconnected. I don't know what words he used. I will not become an object of scorn or sympathy or humor to the world—that Dranow went crazy and the government doctors say he's crazy like this, he's crazy like that. He isn't crazy—you're not talking, or I'm not Jack Ruby.

"*I don't want any doctors* [Emphasis added]; I am getting better. Nor do I want the prosecution or those people surrounded with them to cause or inflict on to me any needless indignities or hurt my feelings.

"My sickness is such—and I had two myocardial infarcts; I have vascular heart disease; I have muscle damage. I can get by under the medication that Doctor Meyer has given me in the last two weeks. I have improved immensely.

"The combination of my heart condition plus mental strain causes tremendous angina pains and disconnects me.

"I beg the Court should see that they shouldn't do any more to me like this, so that I do not have to come before you, or I do not have to become a corpse to prove to your Honor that I am sick.

"The Court: *Let me say this to you, Mr. Dranow: That no government doctors are going to examine you until you have been told about it first by me. Nobody is going to sneak up on you and examine you. And at this moment, I do not anticipate that you will be examined.*

* * *

"*I think if the thing that concerns you is that you are going to be forced to be examined by some Government doctors, you ought to eliminate that from your mind.* [Emphasis added]

"Defendant Dranow: Right. And here is the final thing. I can't refer to my notes.

"Up to Saturday, April 25, two days before trial, I was confused whether I had a lawyer or not. He came to see me. I was mixed up. I want to be ready to trial. I have taken the medication religiously that I was given. I had no lawyer.

"So I asked for permission to go downstairs to call a lawyer. I looked in the phone book and I called a Thomas Gallagan—I don't know how; I will give you his name—from West Chicago. I told him my plight. Here it is, 4/25, and I don't know—I got to go to trial 4/27, and I don't know what to do. So he said that he would come to see me, and he would be allowed to come to see me. He came to see me. There was a message sent to me that Mr. Sullivan, the marshal, refused for me to see any lawyer—just—or Howard Minn, who I do not know, but they were the only lawyers that can come to see me, and this is the way it was on Saturday.

"I would like the Court to set an order down that I can call a lawyer. If my lawyers don't come, I can call Mr. Gallagan and have him come. I never met him. I took his name out of the phone book.

"The Court: Mr. Dranow, you have had opportunities this week to confer with Mr. Schiffer and with Mr. Bagano, haven't you?

"Defendant Dranow: Only—the last time I was here I didn't speak to them at all. There were late sessions here, a couple of late sessions. I didn't have a chance to talk to them alone—that is, since the 25th. But I should be allowed, I think, inasmuch as everybody else has got lawyers, and inasmuch as Mr. Peretz has them all floating around by the dozens here—that I should be able

to call Mr. Gallagan if I feel that I want to tell him something in a hurry that I will forget before I can get in touch—

"Mr. Ragano: Mr. Dranow—for the purpose of the record here, I would respectfully request that your Honor ask Mr. Dranow whether or not he wants me to represent him. Because if he doesn't, I would be glad to withdraw.

"The Court: *I have already asked that question and that's water over the dam. Mr. Dranow has had a chance to say whatever he has wanted to say and, now, he is going back in court.* [Emphasis added]

* * *

"Mr. Bellows: * * * I'm afraid that all this is liable to reoccur, and reoccur, and there may be a great deal of irresponsibility during the trial, statements made on the witness stand when Mr. Dranow testifies. I don't think that he is of condition.

"I am afraid, your Honor, that my client and perhaps the rest may suffer because of Mr. Dranow's peculiar situation, and I ask on behalf of my client for a severance from Mr. Dranow. I have made previous motions for severance.

"The Court: And your motion on behalf of your client will be considered by the Court as a motion by all defendants, and your motion and their motion for severance is denied.

"Let's get back in court."

* * *

On May 11, 1964, still during the selection of the jury, the Court received the following telegram from Dranow (Doc. Ex. App. 13-14):[17]

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[17] "Doc. Ex. App." references are to the Document Exhibit Appendix as printed for the Court of Appeals, and on file with this Court.

"This is advise the court that as of today I chose to be my own lay lawyer in the case now before you as that is my right under the law I ask the court not to appoint any lawyer for me as I wish to seek advise only as to procedure from sources that have no connection whatsoever with the prosecution, my co defendants or any defense lawyer for any and all defendants I choose only myself as my lawyer my reasons have been set forth by mail to the court in the past and now the situation is that lawyers Schiffer and Ragano regard me as deranged. They either ignore my queries or humor me with some placating uselessness and procrastinations as if I were witless. I never knew or chose Howard Minn nor do I want him to be my lawyer. I never knew or chose Harvey Siletz nor do I want him to be my lawyer. I do not want lawyers Schiffer and Ragano as my defense attorneys nor do I want any claims or arguments made by any of these four lawyers to be binding on me heretofore or in the future. On May 3rd I was advised by Dr. Herbert Meyer as to my current physical and mental condition on Friday May 7th I read a report on me from Dr. Appell a psychologist I understand that there is also a report from mental doctor Salon who I am told finds me also unbalanced these reports plus my having a chest seizure on May 9th in your court room together with the fact that the long days of the first two weeks of trial are proving to be more than I can stand make me feel that this Wednesday May 13th would be an ideal day for the Government doctors to examine me so that the court may be fully advised as to my condition of health and mind at the present time. There is an infirmary here at Wheaton County Jail and I ask the court not to allow me to be examined elsewhere without Dr. Herbert Meyer being present at all times when the Government doctors examine me I ask the court to see that I am examined by the Government

doctors under the same conditions that I have been examined by the other doctors. I can see no possible reason to be carted around to strange places by strange marshals and drain whatever strength I have needlessly I also ask the court to see that I am not moved to any other institution until Dr. Meyers feels that it would be safe. Strange places and strange faces fill me with fear I am sending a copy of this telegram to lawyers Schiffer and Ragano and asking them to advise lawyers Minn and Siletz what are my wishes in the subject matter."

When the Court showed the telegram to counsel, the lawyers for all co-defendants asked the Court for a severance in view of Dranow's mental breakdown. (Tr. 2240-2243; 2252-53). They also moved that Dranow be examined. (Tr. 2258).

Dranow's counsel again told the Court that "the man is mentally deranged. This man cannot understand the significance of a legal point" (Tr. 2247); and that they could not get direct responses from him to questions concerning his defense. They again suggested that Dranow be examined. (Tr. 2248). Defense counsel suggested that in view of Dranow's irrational conduct the Court should make appropriate inquiry. (Tr. 2252). The Government took the position that Dranow's mental capacity could be brought into issue only "properly." (Tr. 2243).

Dranow was brought into the Court's chambers where the Court asked him if he desired his present counsel to continue to represent him. He answered in the affirmative. (Tr. 2258-9). The Court denied the various motions for severance and for a mental examination "in the face of this record." (Tr. 2258-2260; I D.A. 552).

Dranow testified against the advice of his counsel, and against the wishes of counsel for co-defendants (Tr. 14117-14118). When he took the witness stand, Government counsel asked the Court to admonish him not to refer to prior convictions of any defendants. (Tr. 14114). Counsel for co-defendants renewed their motion for a severance. (Tr. 14116-18). Counsel for petitioner Hoffa stated (Tr. 14116):

> "In line with what has been represented to your Honor before concerning the possibility of Mr. Dranow's incompetency—
>
> * * *
>
> "His own activities in writing to your Honor—we are informed that he has written many letters to many people—in consideration of conversations I myself have had with Mr. Dranow, in consideration of his conduct in the hall this morning when he undertook to excoriate a prosecutor from St. Paul or Minneapolis who was brought here—I don't know, or I assume who came here, at least who had engaged in a prior prosecution of him—in very intemperate language, I don't believe that the gentleman is competent. And I ask the Court to examine him and to determine that he is incompetent to testify, and to give us a severance from him at this point."

The Court denied both motions. (Tr. 14117).

Dranow's conduct during the trial was irrational. He had frequent clashes with spectators and counsel on both sides. (Tr. 14135-40, 14326, 14337, 14339, 14342-3, 14373-4). He was belligerent, discourteous, vulgar, non-responsive, and his statements during his testimony were frequently incoherent (Tr. 14125, 14132, 14224, 14295-6, 14311, 14315, 14332, 14333, 14337, 14340, 14344, 14346, 14381, 14385, 14402, 14659, 14662).

During direct examination, he stated that he was under life "sentence" (Tr. 14297); that "if it is up to Mr. Kennedy to leave me out of jail, I will be there until I die" (Tr. 14297); and that he had "been convicted three times on the same kind of monkey business." (Tr. 14295). He engaged in frequent outbursts. When asked whether he had any connection with the Teamsters Pension Fund, he replied, "Yes. I'm their representative in the prison. If the prison wants a loan, I will recommend it." (Tr. 14385-6). He stated to the prosecutor, on cross examination, "It's about time you got wise. Say a little more and I'll mutilate you." (Tr. 14663). He, also in the presence of the jury, accused Government counsel of lying (Tr. 14661) and of suppressing evidence. (Tr. 14659).

During Dranow's testimony the motions of the other defendants for a severance from Dranow and mistrial were renewed and denied (Tr. 14376, 14386, 14664).

At no time did the Court conduct a hearing or cause Dranow to be examined as to his mental condition.

VIII. Refusal of Trial Judge To Grant Other Petitioners a Severance from Dranow Even Though: (A) Two Letters Written by Dranow Were Extremely Prejudicial to the Other Petitioners Against Whom Such Letters Were Clearly Inadmissible; and (B) Further Irreparable Prejudice Was Caused the Other Petitioners by Dranow's Irrational Conduct During the Trial

A. On cross-examination petitioner Dranow was asked:

> "* * * Did you ever write a letter to S. George Burris in which you told him, 'Everything can be blamed on me, and everything that could be put on to me to protect others should be blamed on me. But don't let that affect your feelings toward me in any way whatsoever'." (III D.A. 1910).

The Court overruled objections and motions for mistrial by other petitioners. The judge instructed the jury to consider the matter only as to petitioner Dranow. (III D.A. 1911). A request for a hearing outside the presence of the jury as to the materiality of the matters contained in the letter was denied. The jury was again instructed that the matter was to be considered by them only for the purpose of impeachment of Dranow's testimony and to affect his credibility. (III D.A. 1912-1914).

Petitioner Dranow then testified that although the letter was in his handwriting, he did not recall writing or sending it, or to whom it was written.[18] (III D.A. 1914-15).

Over further objections of defense counsel (Tr. 14397-14401), Dranow was asked if he wrote a second letter, saying:

> "I want the following amounts put away for me from each of the following persons each day. I want all this money put in one spot where it will be picked up four or five times a year, and enable me to pay for the new place and business:
>
> a. The California buildings, $10.00 per day;
>
> b. George Burris, Irving ask George, $10.00 per day;
>
> c. Sam Hyman, George ask Sam, $10.00 per day;
>
> d. Cal Kovens, George ask Cal, $10.00 per day;
>
> e. Glenn Hillborn, Fashion Mart Building, George ask Glenn, $5.00 per day;
>
> f. Lou Gladstone, Milton talk to Lou, $15.00 per day." (Tr. 14399)

[18] The letter, Gov. Ex. 1001, was addressed to "George."

Dranow thought that the letter was in his handwriting. But he did not recall writing or sending such a letter to Irving Link. (III D.A. 1915).

In rebuttal, the Government recalled Irving Link who testified that he received the foregoing letters from Dranow addressed to a "Buck Traube." (III D.A. 2020). Petitioners' motions to strike Link's testimony and for a severance from Dranow were overruled. The jury was again instructed that the testimony applied only to Dranow. (III D.A. 2018-2019).

Subsequently, because the "danger [was] so great in regard to these other defendants" (III D.A. 2059), the Court struck the Dranow and Link testimony relating to the letters and instructed the jury to disregard such testimony. (III D.A. 2061-2066). Motions for mistrial and for severance were again denied. (III D.A. 2062).

B. The facts pertaining to the issue of petitioner Dranow's mental competency to stand trial are set forth, *supra*, at pp. 36-53. Petitioners' motions based on such facts for an examination of, and severance from, Dranow before trial (I D.A. 552), and during pretrial and *voir dire* proceedings were overruled. (Tr. 923-24, 2240-43; 2252-53; 2258-60). Numerous motions for a mistrial and severance from Dranow made at the time of Dranow's prejudicial outbursts during trial were also denied. (III D.A. 1891, 1885, 1955-56; Tr. 14116-18; App. A, *infra*, p. 35a).

REASONS FOR GRANTING THE WRIT

I. Multiple Schemes and Conspiracies and Irrelevant Transactions Presented as One Single Scheme and Conspiracy To Defraud

When this Court last reviewed the permissible scope of conspiracy prosecutions, it again warned that it would "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404.[19] The present case, essentially a "hodgepodge" of disassociated lawful transactions, presents a singular opportunity for the Court to review and delineate the permissible limits of conspiracy prosecutions. If permitted to stand, it will "broaden" the "wide-sweeping nets" of conspiracy prosecutions in the following respects: A) By the device of alleging, purportedly as a single scheme and conspiracy, unrelated transactions in each of the 28 counts of the indictment, the Government has prosecuted multiple schemes and conspiracies and non-criminal conduct as a single scheme and conspiracy, all to the prejudice of petitioners in conflict with this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750; B) By the same device, the Government misjoined defendants in violation of Rule 8(b), Fed. R. Crim. Proc.; C) By the same device, the Government was permitted to introduce great amounts of evidence which was not material or relevant to the common object of the claimed scheme and conspiracy, in conflict with the decisions of this Court and the Circuit Courts of Appeals; D)

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[19] See also *Krulewitch* v. *United States*, 336 U.S. 440; *Kotteakos* v. *United States*, 328 U.S. 750; *Lutwak* v. *United States*, 344 U.S. 604; *Delli Paoli* v. *United States*, 352 U.S. 232; *Bollenback* v. *United States*, 326 U.S. 607; *United States* v. *Bufalino*, 2 Cir., 285 F. 2d 408; *United States* v. *Wortman*, 7 Cir., 326 F. 2d 717.

The trial Court's instructions erroneously failed to inform the jury that a finding of a single conspiracy and scheme was necessary for conviction, all in conflict with *Kotteakos* v. *United States, supra,* and *United States* v. *Borelli,* 2 Cir., 336 F. 2d 376. We discuss each of these aspects in turn.

A. The decision below is in conflict with *Kotteakos* v. *United States, supra,* and a line of Courts of Appeals decisions based thereon,[20] which hold that it is a prejudicial misjoinder of defendants when the Government prosecutes multiple conspiracies and schemes, each of which does not involve all of the defendants, as one single scheme and conspiracy. All of the judges below agreed that the central purpose of the alleged conspiracy and scheme was to "bail out" Sun Valley. They also agreed that the alleged unlawful scheme and conspiracy was to defraud the Pension Fund by submitting false and fraudulent representations and concealing material facts to obtain loans. Thus it is apparent, as the dissent emphasizes, that unless the evidence concerning a particular loan tended to prove both these ultimate facts, such evidence either established a separate scheme and conspiracy or was wholly irrelevant.

As the dissent points out, there was no evidence that the Miracle Plaza, Miami International Airport Hotel, Birmingham Airport Motel, Club 300, Causeway Inn, the first and third First Berkeley and the fourth Fontainebleau loans had any relationship either to defrauding the Fund or to the common object of the

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[20] *United States* v. *Goss,* 4 Cir., 329 F. 2d 180; *United States* v. *Russano,* 2 Cir., 257 F. 2d 712; *Rocha* v. *United States,* 9 Cir., 288 F. 2d 545; *Daily* v. *United States,* 9 Cir., 282 F. 2d 818; *Canella* v. *United States,* 9 Cir., 157 F. 2d 470.

alleged conspiracy and scheme, namely, the rehabilitation of Sun Valley, Inc. In addition, as the dissent notes, no relation was shown to the rehabilitation of Sun Valley in the following loans: 4306 Duncan Corp., third Fontainebleau, Good Samaritan Hospital, Casa Marina and La Concha, second Key West, second Everglades and the second First Berkeley loans.

Further, as the dissent observes, there was no misrepresentation to, or fraud on, the Fund in the first Everglades, the first Fontainebleau and the first Key West loans.

The 4306 Duncan Corp. loan was completely foreign to any possible concept of a conspiracy among the defendants. There was no claim that any of the defendants profited from that loan. It was solely for the benefit of Trustee Strecker, who was not shown to have any connection with or interest in Sun Valley or any of the other loans proved.

Moreover, as the dissent further notes, there was no evidence that petitioners Strate, Hyman and Kovens had any interest in the success of the claimed common purpose of the conspiracy—the rehabilitation of Sun Valley. Their interests in their loans were for their personal benefit. Cf. *Rocha* v. *United States*, 9 Cir., 288 F. 2d 545; *Canella* v. *United States*, 9 Cir., 157 F. 2d 470. If, taken in the view most favorable to the Government, misrepresentations were made, the loans in which Strate, Hyman and Kovens were respectively interested constituted, if illegal, separate schemes and conspiracies, and were not, in any event, part of the single scheme and conspiracy charged.

B. The above summary demonstrates that the many loan transactions alleged and proved were not "part of

the same series of acts or transactions constituting an offense or offenses" as required by Rule 8(b) for the joinder of defendants.

The claimed cohesive force—common object of the conspiracy and scheme—was the rehabilitation of Sun Valley. Yet, as noted, a majority of the loans had no relation at all to that object, and there was no showing that the many loans alleged constituted a "series of acts or transactions" necessary for the joinder of all of the defendants in each count of the indictment.

C. As we have pointed out, there was no evidence that many of the loans which were proved had any relation either to defrauding the Pension Fund or to the common object of the alleged conspiracy, the rehabilitation of Sun Valley. The evidence with respect to them, as the dissent holds, was wholly irrelevant and immaterial to the unlawful conspiracy charged, and the approval of its admission was therefore in conflict with the Seventh Circuit's own decision in *United States* v. *Wortman*, 326 F. 2d 717; and with *United States* v. *Crimmins*, 2 Cir., 123 F. 2d 271; *United States* v. *Peoni*, 2 Cir., 100 F. 2d 401. Cf. *Krulewitch* v. *United States*, 336 U.S. 440; *Grunewald* v. *United States*, 353 U.S. 391; *Forman* v. *United States*, 361 U.S. 416; *Fiswick* v. *United States*, 329 U.S. 211, 217.

The crime of conspiracy is limited by the scope of the mutual agreement among the conspirators. When the Government attempts to prove a conspiracy by circumstantial evidence, the extent and limit of the common agreement, as in any circumstantial evidence case, must reasonably flow from the circumstances proved. The Government may not set the scope of the common agreement simply by allegations. *Kottea-*

kos v. *United States, supra; United States* v. *Wortman, supra.* The Government's own proof here established that the claimed agreement was limited both by the rehabilitation of Sun Valley and by defrauding the Pension Fund by misrepresentations to obtain loans.

Nevertheless, the Government threw together, and was permitted to prove, all transactions touching any of the defendants which might present the defendants in a bad light to the jury. *United States* v. *Wortman, supra.* The prosecution was not based on "definite proof of specific crime." *United States* v. *Bufalino,* 2 Cir., 285 F. 2d 408, 420. Many of the loans were neither material nor relevant to the conspiracy and scheme which was charged.

D. The case was submitted to the jury without a clear instruction requiring the jury to find a single conspiracy and scheme. This is in direct conflict with *United States* v. *Borelli,* 2 Cir., 336 F. 2d 376. See also *Grunewald* v. *United States,* 353 U.S. 391; *Kotteakos* v. *United States, supra.* The Court instructed the jury that in order to prove membership in the charged conspiracy, it was necessary that the Government prove beyond a reasonable doubt that the particular defendant was aware of the "common purpose". (III D.A. 2143). But the jury was never apprised that it must make the crucial determination of whether the Government's evidence proved the existence of one conspiracy and scheme or of several separate conspiracies and schemes. So, contrary to *Kotteakos,* the jury was permitted to find petitioners guilty simply because one central personality may have been involved in all the transactions.

This case thus presents important questions of general applicability as to what limits on the scope of conspiracy prosecutions are necessary for a fair trial for a specific offense.

II. Communications from Trial Judge to Deliberating Jury in Absence of All Petitioners and Their Counsel

A. The question presented is: "Can criminal convictions stand where there were communications between the Court and the jury during the jury deliberations in the absence of petitioners and their counsel, and there has been no showing that these communications were not prejudicial to the petitioners." That very question is now pending for the Court's consideration in *Grosso* v. *United States,* No. 181 this Term, certiorari granted October 10, 1966, to the decision of the Third Circuit Court of Appeals reported at 358 F. 2d 154.[21] In accordance with this Court's usual practice, we ask, *so far as this aspect of our case is concerned,* that the writ be granted, and our case be decided on the merits in the light of the Court's decision in *Grosso.*

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[21] The question in *Grosso,* the second of two questions presented, is presented in the singular since Grosso is the sole petitioner. See the *Grosso* Petition for Certiorari at p. 2. There, the trial judge, in the absence of petitioner and his counsel, received a jury message on their inability to agree, and told them, via the marshal, to keep on working. Grosso and his counsel learned of the communication shortly thereafter. Subsequently the trial judge, in the presence of Grosso's counsel, received a second and later note to the same effect and answered it in exactly the same way. So the Government argues no real possibility in the record of prejudice to Grosso since the first note, on which Grosso relies, did not in itself result in the jury's agreement. See the *Grosso* Br. in Opp., pp. 6-7. Whatever may be the validity of that argument in Grosso, the real possibility of prejudice to the petitioners on the record here is plain. See Point II-C in the text, *infra.*

B. The decision of the Court of Appeals is in conflict with *Shields* v. *United States*, 273 U.S. 583. There the Court with no requirement as to prejudice reversed a federal criminal conviction because the trial judge violated the right of defendant and counsel to be present when the trial judge answered inquiries from a jury. The decision of the Court of Appeals is further in conflict with the decisions of the Third Circuit Court of Appeals in *Arrington* v. *Robertson*, 114 F. 2d 821, and *United States* v. *Neal*, 320 F. 2d 533; the Sixth Circuit Court of Appeals in *Evans* v. *United States*, 284 F. 2d 393; and the Tenth Circuit Court of Appeals in *Fina* v. *United States*, 46 F. 2d 643. These decisions with no requirement as to showing of prejudice reversed trial courts for their answering of inquiries from the jury in the absence of the defendant and his counsel, or in the absence of defendant alone. This is in line with our reading of *Shields* and the usual rule that no prejudice need be shown for reversal because of violation of a constitutional right. See, too, *Wheaton* v. *United States*, 8 Cir., 133 F. 2d 522, 527; *Outlaw* v. *United States*, 5 Cir., 81 F. 2d 805, 808, 809; *Walker* v. *United States*, D. C. Cir., 322 F. 2d 434, 438 (dissenting opinion of Edgerton, J.), and the dissenting opinion of Judge Swygert in this case (App. A, *infra*, p. 43a); and compare *United States* v. *Behrens*, 375 U.S. 162 (without requirement as to prejudice, conviction reversed because defendant and his counsel were not present at final sentencing); *Snyder* v. *Massachusetts*, 291 U.S. 97, 136 (dissenting opinion: no need of prejudice for due process reversal of conviction because defendant was not permitted to be present at the jury's viewing of the scene of the crime, although his counsel was present); and *Levine* v.

United States, 362 U.S. 610, 620 (dissenting opinion: no need of prejudice for reversal when a Sixth Amendment right to public trial is violated).

C. The decision of the Court of Appeals is in conflict with the decisions of the Eighth Circuit Court of Appeals in *Rice* v. *United States*, 356 F. 2d 709, and *Osborne* v. *United States*, 351 F. 2d 111; the Ninth Circuit Court of Appeals in *Ah Fook Chang* v. *United States*, 91 F. 2d 805; and the Tenth Circuit Court of Appeals in *Little* v. *United States*, 73 F. 2d 861. These cases reversed convictions because of trial judge-jury communications in the absence of the defendant and his counsel. All of these cases explicitly applied the rule that reversal is required unless the record affirmatively shows no prejudice.[22] In this case, the Court of Appeals placed upon petitioners the burden of affirmatively showing prejudice; for, very plainly, the record here does not affirmatively negate prejudice.

Had petitioners been afforded the opportunity, they might have persuaded the trial judge to adhere to his prior position (Tr. 15239; III D.A. 2172, 2176) of not letting the jury have the indictment. Failing that, the petitioners might well have persuaded the trial judge

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[22] Explicit application of the same rule to trial judge-jury communication in the absence of defendant and his counsel resulted in affirmance of conviction in *Jones* v. *United States*, 10 Cir., 299 F. 2d 661, cert. den. 371 U.S. 864; *Ray* v. *United States*, 8 Cir., 114 F. 2d 508, cert. den. 311 U.S. 709; *United States* v. *Compagna*, 2 Cir., 146 F. 2d 524, cert. den. 324 U.S. 867; *Dodge* v. *United States*, 2 Cir., 258 Fed. 300, cert. den. 250 U.S. 660; *Estes* v. *United States*, 5 Cir., 335 F. 2d 609, cert. den., 379 U.S. 964; *Walker* v. *United States*, D.C. Cir., 322 F. 2d 434; *United States* v. *Agueci*, 2 Cir., 310 F. 2d 817; *United States ex rel. Shapiro* v. *Jackson*, 2 Cir., 263 F. 2d 282; *Outlaw* v. *United States*, 5 Cir., 81 F. 2d 805; *Peppers* v. *United States*, 6 Cir., 37 F. 2d 346; *Chambers* v. *United States*, 8 Cir., 237 Fed. 513.

to expurgate the copy of the indictment sent to the jury by elimination of: (1) the adverse breach of trust allegations (see p. 19, *supra*), theretofore kept from the jury because of considerations of fairness readily agreed to by the trial judge and the Government (Tr. 15294; I D.A. 44; III D.A. 2112-2148); (2) the adverse content of the seven counts not submitted to the jury; and (3) all markings.

Had petitioners been afforded the opportunity, they almost certainly would have been able to persuade the trial judge, with or without the Government's acquiescence, to call the jury into open court, ascertain the nature of their confusion, and instruct them accordingly—after due consideration of suggestions, amendments, and additions offered by petitioners. Instead, with no opportunity for objection, the trial judge cut off all inquiry by the jury with his message that the jury was going to get nothing except the indictment. Yet the message from the jury with its references to working papers and documents of law, counts, and overt acts surely indicated that the jury wanted some instruction on something, although just what remains a mystery. Hence, for aught that appears in the record, the jury's verdicts of guilty were influenced by the jury's uncorrected and adverse misconception of some major issue or issues of law or fact or both.[28]

D. In sum, the affirmance of petitioners' convictions on a record which does not negate prejudice contravenes: (1) the rule of *Shields* v. *United States*, 273 U.S. 583, and the other authorities cited in subpoint B,

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[28] See *Bollenbach* v. *United States*, 326 U.S. 607, 612-613; *United States* v. *Jackson*, 3 Cir., 257 F. 2d 41, 43; *United States* v. *Noble*, 3 Cir., 155 F. 2d 315, 318; *Gomila* v. *United States*, 5 Cir., 146 F. 2d 372, 373.

supra, which conclusively presume prejudice in a Sixth Amendment violation by trial judge-jury communication in the absence of defendant and his counsel; (2) the rule of some circuits which, in such circumstances, requires reversal unless the record clearly negates prejudice; and (3) the rule of reversal, unless the record clearly negates prejudice, frequently applied by this Court, not to violations of the Constitution, but to lesser trial errors of non-constitutional proportions.[24]

It is apparent from the decisions cited in subpoints B and C, *supra*, that many Federal trial judges continue to disregard the Sixth Amendment right[25] of a defendant to be present with counsel at all stages of his trial, including responses to jury inquiries. And it is further apparent that the various Courts of Appeals differ as to the rule of prejudice applicable to such widespread and ever-recurring trial errors in violation of constitutional rights. Authoritative clarification as to the rule concerning prejudice is needed. Finally, this Court's review in exercise of its supervisory powers is needed to secure better trial judge compliance with the Sixth Amendment.

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[24] The application of such rule to trial errors of non-constitutional proportions is exemplified by *Bihn* v. *United States*, 328 U.S. 638; *McCandless* v. *United States*, 298 U.S. 342; *Williams* v. *Great Southern Lumber Company*, 277 U.S. 19; *United States* v. *River Rouge Imp. Co.*, 269 U.S. 411; and *Yazoo & Mississippi Valley R. Co.* v. *Mullins*, 249 U.S. 531.

[25] See *Diaz* v. *United States*, 223 U.S. 442, 454; *Ponci* v. *Fessenden*, 258 U.S. 254, 260; *Jones* v. *United States*, 10 Cir., 299 F. 2d 661, 662, cert. den. 371 U.S. 864; *Fina* v. *United States*, 10 Cir., 46 F. 2d 643, 644; *cf. Arrington* v. *Robertson*, 3 Cir., 114 F. 2d 821; *United States* v. *Douglas*, 7 Cir., 155 F. 2d 894.

III. Receipt by Jurors, During Trial, of Prejudicial Newspaper Statements and of Statements by Some Jurors, All Not Presented in Open Court

A. The newspaper article which reached juror Gogerty surely tended to prejudice petitioners. Gogerty, and any other juror reading the article, learned that the trial judge had rejected two motions for judgment of acquittal, and that, in doing so, the trial judge had rejected a contention of Petitioner Hoffa's innocence and good faith. As to the Dranow letters, which the jury had never heard in full, and which the court had ordered stricken as prejudicial, the newspaper article connected them to petitioners and this prosecution, and erroneously stated as a fact that Dranow "asked for a $60-a-day payoff from co-defendants." The several petitioners mentioned by name in but one of the two Dranow letters were not therein described as "co-defendants," and three petitioners were not mentioned at all. (For complete detail, see Statement, *supra*, pp. 21-23, 53-55)

This outside information so tending to prejudice petitioners, which certainly reached one juror and probably reached all of them, was sufficient for a new trial, in the absence of any Government showing of harmlessness. *Parker* v. *Gladden*, U.S. , 87 S. Ct. 468; *Stone* v. *United States*, 6 Cir., 113 F. 2d 70; *United States* v. *Grady*, 7 Cir., 185 F. 2d 273. The affirmance by the Court below of the trial judge's denial of a new trial is contrary to this Court's decision in *Parker*, the Sixth Circuit's decision in *Stone*, and its own decision in *Grady*. For aught that appears in the record, the verdicts against petitioners were not "based on evidence received in open Court" but on evidence "from outside sources" (*Sheppard* v. *Maxwell*, 384 U.S. 333,

351), with consequent violation of petitioners' constitutional rights of confrontation, of cross-examination, and of counsel (see *Parker* v. *Gladden*, U.S. , 87 S. Ct. 468).

B. At a minimum, the protection of petitioners' constitutional rights of fair trial required the trial judge to ascertain what jurors had read the newspaper article carried around by juror Gogerty, and what information they got from it. "Acquittal" in general usage means, or at least strongly suggests, a finding of innocence. To layman jurors in any criminal trial a motion for a judgment of acquittal might well mean a motion for a finding by the trial judge of innocence, and its rejection therefore might well mean a finding of guilt by the trial judge. Doubtless, this is why such motions are heard and decided out of the jury's presence.

But here there was much more to require inquiry of the layman jurors. The article itself described the defense argument in support of the second motion for judgment of acquittal as one made "in contending his client is innocent", and based on a contention "that Hoffa's testimony on the stand . . . was sufficient proof that he acted in 'good faith.'" Rejection by the trial judge of an argument so characterized almost inevitably implies that the trial judge, himself, found petitioner Hoffa guilty, without a defense, and lacking in "good faith" on "the stand," or, i.e., a liar. Unquestionably, the Sixth Amendment would invalidate all verdicts of guilty influenced by such a jury understanding of the trial judge's two rulings against petitioner Hoffa, the central figure in the offenses charged, and a defense witness. Compare *Parker* v. *Gladden*, U.S. , 87 S. Ct. 468, where only the bailiff, not the

trial judge, said petitioner was guilty; and see *Henry* v. *United States,* 6 Cir., 204 F. 2d 817; *Briggs* v. *United States,* 6 Cir., 221 F. 2d 636. Yet here there is the strong prejudice to all petitioners from any reading by the jury of the newspaper article's untested and uncross-examined assertion that petitioner Dranow "would take the blame" and had asked "a $60-a-day payoff from co-defendants" in this prosecution.

The affirmance by the Court below of the trial judge's denial of inquiry of the jury, in these circumstances runs counter to the whole course of settled decisions on the subject. We cite the cases in the margin.[26] In many of them, the potential prejudice to the defendant was fairly comparable to, or even less than, the obvious prejudice to petitioners here. Constitutional rights without remedies are not of much use. Here, both Courts below ignored and denied the well-established remedy for enforcement of petitioners' rights of fair trial. We ask the exercise of this Court's supervisory power in protection of those rights.

C. In another aspect, the denial in this case of new trial or inquiry of the jury presents important questions of the correct interpretation, and the breadth or narrowness of the applicability of this Court's recent decision in *Parker* v. *Gladden, supra,* to the administration of justice in federal and state criminal

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[26] *Janko* v. *United States,* 366 U.S. 716; *Remmer* v. *United States,* 347 U.S. 227, 229-30; *Mattox* v. *United States,* 146 U.S. 140, 150-151; *United States* v. *Accardo,* 7 Cir., 298 F. 2d 133, 136; *Coppedge* v. *United States,* D.C. Cir., 272 F. 2d 504, 508; *Briggs* v. *United States,* 6 Cir., 221 F.2d 636; *Wheaton* v. *United States,* 8 Cir., 133 F. 2d 522, 528; see *United States* v. *Gersh,* 2 Cir., 328 F. 2d 460, 464, cert. den. sub nomine *Mugnola* v. *United States,* 377 U.S. 992; *Baker* v. *Hudspeth,* 10 Cir., 129 F. 2d 779, 782.

proceedings. Here, it is a fact that some of the jurors, including juror Gogerty (later elected foreman) made numerous statements of petitioners' guilt to their fellow jurors. For detail on these statements see *supra*, pp. 23-24. Such statements were all made prior to the jury's deliberations on innocence or guilt. They clearly showed, at least, the premature partiality and bias of the jurors making them. *Parker* invalidated a conviction because of the bailiff's statement to some jurors of the guilt of the defendant,[27] a statement that was of decisive consequence not because of the bailiff's bias, but because his expression of it to jurors was prejudicial to the defendant. The statements of guilt here by some jurors, besides showing their own adverse bias, were likewise calculated to prejudice other jurors against the defendants, petitioners here. As the Court noted in *Parker*, a bailiff in charge of a jury carries great weight with its members. So does a fellow juror, and, even more so, a fellow juror so pre-eminent amongst his fellows as to be elected foreman. Is *Parker* applicable to the prejudicial statements of jurors, or of a jury foreman, made before the jury's deliberations? And, more particularly, in the light of *Parker* and Sixth Amendment rights to a verdict based on evidence at trial considered by impartial jurors, can verdicts of guilty stand, even though the adverse partiality of some jurors is manifest, and their fellow jurors are subject to the repeated impact of their statements of the guilt of the defendants?

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[27] In *Parker*, the bailiff also made a statement that the Supreme Court would correct anything wrong in finding the defendant guilty. An equivalent statement was made by a juror here. See Statement, *supra*, p. 24.

IV. Combination of Pre-Trial Publicity, Inadequate Voir Dire To Determine Prejudice Resulting From Such Publicity, the Availability to the Jury of the Excluded Prejudicial Evidence, and Sequestration of the Jury on a Military Reservation

A new trial must be ordered whenever "by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused." *Simmons* v. *United States,* 142 U.S. 148, 154. If even a single prejudicial newspaper article reaches the jury, a new trial is necessary, *Mattox* v. *United States,* 146 U.S. 140, for the Sixth Amendment requires a "jury capable of taking in, free from prepossessions, evidence submitted in open court," unaffected "by press and radio [saturation] for months preceding . . . designed to establish the guilt of the accused." *Irvin* v. *Dowd,* 366 U.S. 717, 729, 730 (Frankfurter, J., concurring). See also *Estes* v. *Texas,* 381 U.S. 532; *Delaney* v. *United States,* 1 Cir., 199 F.2d 107.

In *Marshall* v. *United States,* 360 U.S. 310, a conviction was reversed because, during trial, some of the jurors had read two newspaper articles containing legally irrelevant, but highly prejudicial, information about the defendants. Even though the jurors stated they could reach a decision unaffected by these articles, this Court, invoking its supervisory power over the federal judiciary's administration of the criminal law, ordered a new trial.

The instant case presents a more extreme and compelling version of the same issues. As we have shown, in the weeks immediately prior to and during the jury selection, Chicago newspapers and magazines of na-

tional distribution (which were sold in the very lobby of the Courthouse), featured articles portraying petitioner Hoffa as a brute, as assassin, and a killer of children. These highly inflammatory tales of "Hoffa's Savage Kingdom" [28] and the "Hoffa Plot . . . on Life of Bob Kennedy," [29] which were obviously written with the cooperation, if not at the instigation, of the Attorney General's office,[30] could not help but influence any reader. Other articles reported that the then Attorney General Kennedy—who had come to Chicago on May 1, 1964, while the jury was being selected from a panel not yet sequestered—had asserted these allegations as proven facts. So these articles further emphasized the image of petitioner Hoffa as a criminal-at-large while prospective jurors were free to read and discuss them.

Instead of the careful *voir dire,* obviously necessitated by this prejudicial publicity, the trial court so limited the examination of prospective jurors that defense counsel could not make intelligent use of their peremptory challenges. Although *voir dire* "must be exercised with full freedom, or it fails of its full purpose," because it is designed to allow "extensive and probing" questions "to ascertain the possibility of bias," *Swain* v. *Alabama,* 380 U.S. 202, 218-220, the defense was not permitted to ask questions about veniremen's political affiliations, their knowledge of the well-publicized Kennedy-Hoffa controversy, or their attitudes toward unions. Questions to determine

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[28] Life Magazine, P. Ex. A., pp. 23-24.

[29] Chicago Sun-Times, P. Ex. A., p. 4.

[30] This is clearly demonstrated by the nature of the information in these articles.

whether prospective jurors had read about the instant case, petitioner Hoffa, or other Hoffa trials were also prohibited. When one venireman admitted having read newspaper editorials about petitioner Hoffa, counsel was not permitted to ask whether these comments led him to any feeling or opinion about Hoffa at that time. The Court ruled that it would permit inquiry only into attitudes presently held by the prospective jurors. In the end, the Court allowed only three questions of each venireman from all defendants as a group. (I D.A. 500) Clearly, this procedure denied petitioners their "right 'to probe for the hidden prejudices of the jurors.'" *United States* v. *Napoleone*, 3 Cir., 349 F.2d 350, 353.

At the same time, the prejudice from the adverse publicity which emanated from petitioner Hoffa's earlier trial and conviction in Chattanooga[31] was reinforced in the jurors' minds by the sequestration of each juror, over the objections of all defendants, as soon as his *voir dire* began. Against the background of petitioner Hoffa's then recent conviction for jury tampering, this action obviously implied that the present jury was threatened with similar conduct by petitioners. The prejudice resulting from sequestration was aggravated by the jury's transfer from a downtown hotel to the Great Lakes Naval Station, a military reservation 36 miles from the Courthouse. From the time of this transfer until the end of the trial, the jury spent all its free time in the military compound, where all recreation—and even dental work—was carried on under the direct supervision of federal marshals, and the general supervision of the mili-

[31] The Chattanooga trial began January 20, 1964, and continued until March 4, 1964.

tary. (I D.A. 574-580; P. Ex. A. 2-3) We know of no other case in which a jury has been sequestered on a military reservation.

The insinuation of guilt by sequestration amounting to protective custody in a military establishment, apparently in response to threats suggested by pretrial publicity, created a prejudice outweighing any possible protection purportedly afforded by such sequestration. Here, sequestration did significant damage. It reaffirmed all the accusations and innuendos which the mass media had carried to the jurors.

There was additional severe prejudice to petitioners from publicity during the trial. When the Government attempted to impeach defendant Dranow with two letters appearing to contain a confession, implications of mutual guilt, and an offer to accept a prison sentence in return for sixty dollars per day, the Court found these documents so dangerously prejudicial that it struck them from the record. Nevertheless, as stated in Point III, the jury received an erroneous account of such action, as well as a misleading report of the trial judge's denial of motions for acquittal. For a statement of this in detail, see Point III, *supra*.

If the jury's verdicts of guilty are permitted to stand, there will be nothing left of the undeviating rule of this Court, as announced by Mr. Justice Holmes over half a century ago in *Patterson* v. *State of Colorado*, 205 U.S. 454, 462:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

See *Sheppard* v. *Maxwell*, 384 U.S. 333, 351.

Here, then, is a petition which poses the most serious problems of fair trial and due process. Our constitutional commitment to protect a defendant "from the inherently prejudicial publicity which saturated the community" commands a careful balancing of the forces affecting petitioners' trial. *Sheppard* v. *Maxwell, supra,* at 363. The combination of longstanding allegations of guilt, a series of highly emotional accusations during the period immediately before and during the trial, a *voir dire* so limited it was meaningless, and the obvious suggestion of a prior guilt created by the jury's sequestration in a military reservation could not help but influence the verdict. This, coupled with the actual presence of a prejudicial newspaper article in the jury's quarters, denied petitioners any semblance of a fair trial.

"Due process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard* v. *Maxwell, supra,* at 362. Because the necessary safeguards were not taken in this case, because the trial court failed "to make as sure as is humanly possible that one after whom the mob and public passion are in full pursuit is treated fairly," *Beck* v. *Washington,* 369 U.S. 541, 587 (Douglas, J., dissenting), a new trial is necessary. Nothing less will afford petitioners "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers* v. *State of Florida,* 309 U.S. 227, 236-237.

V. Impeachment of Petitioner Hoffa by Use of a Conviction, Particularly One Which: (1) Was, and Still Is, Not Final; (2) Was for an Offense Subsequent in Time to the Offenses Charged Here; and (3) Was Obtained for Use at This Trial by the Government's Manipulation of Indictments, Trials, and Charges

A. The holding here of the Court of Appeals that it is proper to impeach a defendant by a conviction still on appeal and not final is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Fenwick* v. *United States,* 252 F.2d 124. In the latter case, the Court reversed Fenwick's conviction precisely because of such impeachment by a non-final conviction, and further held it to be immaterial that before its decision the impeachment conviction had become final by reason of the same Court's affirmance. Here the impeaching conviction for jury-tampering is still in the appellate process and not final.[32] (See Statement, *supra,* pp. 31-32).

The *Fenwick* decision in the District of Columbia Circuit followed two earlier decisions in the same circuit. See *Campbell* v. *United States,* 176 F.2d 45 (Impeachment by a conviction on appeal *held* error); *Beasly* v. *United States,* 218 F.2d 366, cert. den. 349

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[32] The disagreement between the holding of the Court below and the decisions of the Court of Appeals for the District of Columbia Circuit in *Fenwick,* and other cases cited in the text of this Point V on impeachment, is further emphasized by another consideration. In the District of Columbia Circuit, unlike other federal jurisdictions, it is a statute of Congress which makes prior convictions generally admissible for purposes of impeachment; and the Court of Appeals for that Circuit has some doubt as to its power to find some types of prior convictions inadmissible. See *Richards* v. *United States,* D.C. Cir., 192 F. 2d 602, 606, cert. den., 342 U.S. 946; *Brown* v. *United States,* D.C. Cir., F. 2d , (11/10/66).

U.S. 907 (Impeachment by conviction on which sentence was not yet imposed *held* error).

The decision of the Court below followed its earlier decision in *United States* v. *Empire Packing Co.*, 174 F.2d 16, cert. den. 337 U.S. 959 (In a non-jury case, impeachment by a conviction then on appeal *held* proper). And the result reached by the Court below finds some support in *Bloch* v. *United States*, 9 Cir., 226 F.2d 185, cert. den. 350 U.S. 948 (Prosecutor's asking defendant about a conviction then on appeal *held* not a showing of bad faith on prosecutor's part).[33]

The conflicts between the *Fenwick* and *Campbell* decisions in the District of Columbia Circuit and the Seventh Circuit's decision in this case and in *Empire Packing Co.* have been intimated by the Court below (App. A, *infra*, p. 28a), and expressly noted by the trial judge in this proceeding (I D.A. 367), the Court of Appeals for the District of Columbia Circuit,[34] the Court of Appeals for the Ninth Circuit,[35] and the Court of Appeals for the Second Circuit.[36]

The confusion in the Circuits arising from the conflict between the rule applied in the District of Columbia Circuit and that applied in the Seventh Circuit is increased by the application in the Second Circuit of still a third rule which is different from both of them. In the District of Columbia Circuit, a non-final

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[33] However, *United States* v. *Levi*, 177 F. 2d 827, a decision of the Seventh Circuit, held it reversible error to impeach by a conviction then subject to a motion for judgment of acquittal.

[34] See *Fenwick* v. *United States*, 252 F. 2d 124, 126n.

[35] See *Bloch* v. *United States*, 226 F. 2d 185, 188, cert. den. 350 U.S. 948.

[36] See *United States* v. *Owens*, 271 F. 2d 425, 426.

conviction cannot be used for impeachment, whatever may be the subsequent history of the conviction. In the Seventh Circuit, a non-final conviction can be used for impeachment, whatever may be the subsequent history of the conviction. But in the Second Circuit such use of a non-final conviction is not reversible error if the conviction later becomes final; and the question is open whether it be reversible error if the conviction is later invalidated. See *United States* v. *Cipullo,* 170 F.2d 311, and *United States* v. *Owens,* 271 F.2d 425.

Each of these three differing rules is well-embodied in its own Circuit by the authority of at least two decisions within each Circuit. The mere passage of time without this Court's intervention is not likely to effect reconciliation and the achievement of one rule consonant with constitutional rights and uniform for all federal circuits on this question which so strongly and so often affects the issue of acquittal or conviction.

In the development of our jurisprudence, judicial proceedings have been evolved for the testing of the validity of a conviction against pertinent provisions of the Bill of Rights. To permit impeachment by a conviction that was and still is under judicial scrutiny in such proceedings comports neither with the Constitution, nor with the law's providing of such proceedings to ensure protection of a citizen's Constitutional rights.

B. Entirely apart from the problem of a non-final conviction, the decision of the Court below is in conflict with the decisions of the Court of Appeals for the District of Columbia Circuit in *Luck* v. *United States,* 348 F.2d 763, and *Brown* v. *United States,* — F.2d —.

The *Luck* and *Brown* cases require a trial judge in the District of Columbia to permit or prohibit impeachment only upon a search for the truth by considering all relevant factors, such as, for example, the need for the defendant's testimony, and the prejudice to defendant as against the relevance of the conviction to his credibility. But here the trial judge and the Court of Appeals, in the light of prior decisions in the Seventh Circuit, approved the impeachment of petitioner Hoffa upon an automatic rule of admissibility, regardless of prejudice and relevance to credibility or any other circumstance. See App. A, *infra*, p. 28a; *United States* v. *Pinna*, 7 Cir., 229 F.2d 216, 219; and *Rinella* v. *United States*, 7 Cir., 60 F.2d 216, 218.

Permitting impeachment by prior conviction of a man on trial for his life or liberty gives him but a ruinous choice. He can testify in his own defense, and if so, he runs the risk that the jury, no matter how instructed, will deduce his guilt of the charged crime from the fact of his prior conviction.[37] Or he can decline to testify, and if so, he runs the risk that the jury, no matter how instructed, will deduce his guilt

[37] Recent studies of juries by the University of Chicago have found that jurors have "an almost universal inability and/or unwillingness either to understand or follow the court's instruction on the use of defendant's prior criminal record for impeachment purposes. The jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial." 70 Yale L.J., 764-777. Other case studies have demonstrated that innocent defendants are often deterred from testifying in their own behalf because of the fear of impeachment by prior convictions, and that such impeachment has been a key factor in convicting innocent persons. 78 Harv. L. Rev., 426, 442; Borchard, *Convicting the Innocent* (1932) 121, 138, 163, 232, 365-66; Frank, *Not Guilty* (1957) 106-07.

of the charged crime from the fact of his silence. Neither choice is conducive to the ascertainment of the truth and the protection of the innocent. Hence, if such impeachment is to be permitted at all,[38] the rule adopted by the District of Columbia Circuit is preferable to the rule of the Court below. The District of Columbia rule, at least, seeks, in the light of all pertinent circumstances, to balance the remoteness or closeness of a prior conviction's relation to credibility against the great or small need for the defendant's testimony, and the great or small prejudice to him if impeachment be permitted.

Yet, neither rule is best adopted for the ascertainment of the truth and the protection of the innocent against verdicts of guilty. This case provides an appropriate occasion for the Court's first consideration of a rule on impeachment for the federal courts which would seem best in assuring the ascertainment of the truth and the protection of the innocent—the two paramount objectives of justice in criminal cases. Such a rule, as repeatedly suggested or recommended by the

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[38] The rule permitting such impeachment is a relic of the original common-law rule that persons who had been convicted of infamous crimes were incompetent to testify even in their own behalf. Both the original rule and its derivative are based on the assumption that the testimony of defendants having such prior convictions is less trustworthy than the testimony of other defendants. Ladd, *Credibility Tests—Current Trends*, 89 U. of Pa. L. Rev. 166, 174-76; 2 Wigmore, *Evidence* (3d. 1940) § 519, p. 608; *Clawans* v. *District of Columbia*, D.C. Cir., 62 F. 2d 383, 384, aff., 300 U.S. 617. This assumption, it has been pointed out, has no basis in experience or reason, and even if it were sound as a general proposition, it is not so infallible as to warrant its application to any particular defendant. *Ladd, supra*, at 176-78; 2 Wigmore, *supra*, § 519, p. 602; 70 Yale L.J. 764.

studies of legal scholars,[29] would bar all impeachment by conviction of a man on trial for his life or liberty and testifying in his own defense—at least where he has not put his own character in issue.

C. Finally, the Government's manipulation of indictments, trials, and charges so as to create the record of a conviction of a subsequent offense for impeachment use in the trial here of a prior offense (see Statement, *supra*, pp. 29-31) is the same as the governmental operation condemned as basically unfair, and therefore requiring reversal, in *Commonwealth* v. *McIntyre*, 417 Pa. 415, 208 A.2d 257 (1965). The affirmance of petitioners' convictions in disregard of the Government's unfair and manipulative tactics, which helped the getting of those convictions and violated petitioners' rights to a speedy trial, calls for review by the Court in the exercise of its supervisory powers.

VI. Prejudicial Trial Errors in Violation of Governing Statute, Rule, or Due Process Clause, Which Denied Petitioners a Fair Trial.

A. *Non-Public Selection of Petit and Grand Jury.*

Here, the Court of Appeals holds that the statute's requirement of "names * * * publicly drawn" does not mean disclosure of the names being drawn, but only that undisclosed names be drawn in a public place.

This holding eviscerates what appears to be the express language of the statute, (28 U.S.C., Section

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[29] See *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L.J. 764, 765-778 (1961); *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 Harv. L. Rev. 426, 442; McCormick, *Evidence* (1954) § 43; Ladd, *Credibility Tests—Current Trends*, 89 U. of Pa. L. Rev. 166, 189.

1864), and is in conflict with *Wagner* v. *United States*, 9 Cir., 264 F.2d 524, and *United States* v. *Standard Oil Co.*, N.D. Ind., 165 F. Supp. 359.

The purpose of the mandatory provisions of the statute is to guarantee that there will be no arbitrary or capricious procedure involved in the selection of a jury. *United States* v. *Standard Oil Company, supra.* As the Court in *Wagner* v. *United States, supra,* at 528, recognized:

> "... Section (28 U.S.C.A. Sec. 1864) makes it clear that members of the public are entitled to be present when the names of grand and petit jurors are drawn. *Presumably this would give a person then present an opportunity to copy down the names so drawn.*" (Emphasis supplied)

Only by the public reading of the names, so that they may be heard and noted by persons other than the Court officials, is a check provided to ensure that the veniremen summoned are those whose names were drawn.

B. *The Removal of a Juror and Replacing Him by an Alternate, Without Ascertaining Whether the Removed Juror had Become Unable to or Disqualified to Perform His Duties.*

Rule 24(c), Federal Rules of Criminal Procedure, provides:

> "Alternate jurors ... shall replace jurors who, prior to the time the jury retires to consider its verdict, become *unable to or disqualified* to perform their duties." (Emphasis supplied)

The grounds for disqualification of jurors are set forth in 28 U.S.C. § 1861: (1) felony conviction, (2) inability

to read, write, speak and understand the English language, and (3) incapacity of the juror by reason of mental or physical infirmities to render efficient jury service. Obviously the first and second grounds of statutory disqualification do not apply here. Whether juror Lee was unable to or disqualified by "mental infirmities" to perform his duties because of the injury to and possible death of his mother could not rationally be determined without inquiry of him.

Therefore, this Court should examine the question of whether or not the discharge of the juror in these circumstances was in violation of Rule 24(c) and a denial to petitioners of the right to trial by the jury selected to try the case.

C. *Trial Court's Instructions as to Inaudible Testimony.*

By instructing the jury to consider inaudible evidence as affirmative answers against the petitioners (for details, see pp. 34-35, *supra):* (1) The Court altered the testimony of a vital witness and caused a distortion of the testimony; and the Court in effect became a witness for the Government by telling the jury to assume an affirmative answer; (2) The Court descended into the trial arena and coached the prosecutor by advising him that, in light of such a rule, questions could be phrased accordingly and thereby punishment would automatically be meted out to petitioners; (3) The Court punished petitioners for the failure of the Government witness to speak loudly;[40] and (4) The

[40] As the Court said with respect to its instructions to the jury: ". . . we will know who will be penalized by that." (I D.A. 781)

Court destroyed the constitutional rights of petitioners to confrontation and cross-examination.

These actions by the trial court did violence to every precept governing the separation of the prosecutive and judicial functions. *Cf. Billeci* v. *United States,* D.C. Cir., 184 F.2d 394, 403; *Adler* v. *United States,* 5 Cir., 182 Fed. 464, 472-474; *Connley* v. *United States,* 9 Cir., 46 F.2d 53, 55-56; *Frantz* v. *United States,* 6 Cir., 62 F.2d 737, 739; *Williams* v. *United States,* 9 Cir., 93 F.2d 685, 690, 691; *United States* v. *Minuse,* 2 Cir., 114 F.2d 36, 39.

The affirmance by the Court of Appeals approves a radical new principle of evidentiary law in conflict with elementary concepts of due process of law. So, the Court of Appeals has sanctioned a rule which so far departs from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

D. *The Jury Instruction that One Using a Position of Trust to Obtain Benefits is Performing an Active Fraud.*

The approval by the Court of Appeals of a jury instruction which equates "breach of trust" and "active fraud" (for detail see *supra,* p. 35) is in conflict with the decision in *Epstein* v. *United States,* 6 Cir., 174 F.2d 754. *Epstein* holds that a breach of trust does not in itself constitute fraud under the mail fraud statute, when the circumstances of that breach do not themselves amount to active fraud.

In this criminal fraud case, conviction required proof that petitioners devised a scheme and conspiracy to defraud the Pension Fund. The instruction of the

trial court, equating "breach of trust" and "active fraud," diverted the jury's attention from the scheme and conspiracy to defraud as alleged in the indictment, and permitted the jury to convict for the simple breach of a civil fiduciary duty.[41]

Moreover, the trial court's instruction tended to withdraw from the jury its responsibility to determine whether the necessary facts existed to find culpable intent to defraud. Intent was a crucial issue in this case and it was imperative that the instructions on intent and good faith be clear and accurate. This instruction contradicted other instructions on intent and at best rendered the charge equivocal on a basic and vital issue, all contrary to this Court's teaching in *Bollenbach* v. *United States,* 326 U.S. 607, 612-615.

VII. Failure of the Court To Conduct a Hearing as to Petitioner Dranow's Mental Competency To Consult With His Attorneys and To Stand Trial

This case presents questions of general applicability affecting the administration of criminal justice as to whether a trial judge, by reason of either (a) due process of law or (b) Title 18 U.S.C. § 4244, is required to conduct a hearing to determine a defendant's mental competency or to order a mental examination of a defendant, when irrational conduct of such defendant is brought to the Court's attention.

A. It is apparent from the facts recited in the Statement (*supra,* p. 36 ff.) that Dranow was not cooperat-

[41] The instruction, coupled with the Court's failure to define "fiduciary," prejudiced all the petitioners. For the evidence showed that various petitioners had economic relations with each other, or with others, which the jury could have understood to be fiduciary relations. *Cf. Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 85.

ing with his counsel, that he resented their representations that he was deranged, and that he resisted their efforts to have him examined. Obviously, also, his irrational conduct before and during the *voir dire* examination, as well as during the trial, strongly indicated that he was mentally incompetent. Under these circumstances, the trial judge should have conducted a hearing to determine his competency. The failure to do so was violative of due process. *Pate* v. *Robinson,* 383 U.S. 375 (1966); *Pouncey* v. *United States,* D.C. Cir., 349 F.2d 699.

The conviction of an accused while he is mentally incompetent violates his constitutional right to due process of law and cannot be sustained. *Pate* v. *Robinson,* 383 U.S. 375; *Bishop* v. *United States,* 350 U.S. 961. The competency of a defendant to stand trial may even be raised on an after-trial motion to vacate a sentence though the defendant failed to raise it at his trial. *Pate* v. *Robinson, supra; Floyd* v. *United States,* 5 Cir., 365 F.2d 368 (1966). For, if incompetent, he cannot "knowingly or intelligently 'waive' his right to have the Court determine his capacity to stand trial." *Pate* v. *Robinson, supra,* at 384.

In *Pouncey* v. *United States,* D.C. Cir., 349 F.2d 699, during the trial the defendant accused his counsel of being "in league with the prosecutor," insisted on taking the witness stand, and said before the jury, "Plead me guilty to the charge." Such irrational conduct was held to cast serious doubt on the defendant's ability to consult with his attorney. The case was remanded for a mental examination of the defendant. Here, the conduct of Dranow during the trial was more irrational than that of the defendant in *Pouncey.* His flippant, obstreperous, incoherent, non-

responsive and self-incriminating testimony invited the jury to convict. His conduct and testimony corroborated his counsel's pretrial statements that they were unable to get responses from him and to consult with him.

The trial judge was apparently of the mistaken view that he must first review and weigh all prior medical reports to determine whether Dranow should be mentally examined. Certainly, by the time the Court received Dranow's telegram, still during *voir dire,* Dranow's conduct itself had demonstrated to the Court the need for an examination. The renewed motions of Dranow's counsel for his mental examination should have been granted, despite Dranow's opposition. *Hansford* v. *United States,* D.C. Cir., 365 F.2d 920; *Whalen* v. *United States,* 5 Cir., 367 F.2d 468. In any event, the evidence here, as clearly as in *Pate,* "entitled [Dranow] to a hearing on this issue." 383 U.S. at 385. Since his "constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial," a new trial is required. *Pate,* at p. 386.

B. The Court erred in not ordering an examination of Dranow pursuant to Section 4244, Title 18 U.S.C., even though medical reports were never filed.

Section 4244 empowers and requires the trial judge, when reasonable cause appears, to have an accused examined as to his mental condition by a qualified psychiatrist upon the motion of either party or the Court for a "judicial determination of such mental competency of the accused." It was enacted to give recognition to the need for the advice of psychiatrists

in detecting mental ailments not apparent to laymen.[42] The congressional purpose was to provide for a pretrial psychiatric examination whenever the mental competency of an accused comes under suspicion,[43] and to provide a means by which competency may be judicially determined. *United States* v. *Walker,* 6 Cir., 301 F.2d 2[illegible].[44] The Court's ultimate duty is to determine whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky* v. *United States,* 362 U.S. 402. Here, the probable mental incompetence of Dranow was much more than a suspicion, and the trial judge failed in both his duties to have Dranow examined and thereafter to make a proper determination.

A court is not allowed "* * * to determine [without examination] that there is not cause to believe that an accused may be insane or otherwise mentally incompetent," because that "would be inconsistent with the legislative purpose to provide for the detection of mental disorders 'not * * * readily apparent to the eye of the layman.'" *Wear* v. *United States,* D.C. Cir., 218 F.2d 24, 26; *Kenner* v. *United States,* 8 Cir., 286 F.2d 208. In this case the trial judge refused any

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[42] *Report of Committee of the Judicial Conference to Study Treatment Accorded by Federal Courts to Insane Persons Charged With Crime,* 1944.

[43] Senate Report No. 209, 81st Cong., 1st Session; House Report No. 1319, 1949 U.S. Code Cong. Service, p. 1928.

[44] Underlying this was the need to prevent an incompetent person from undergoing trial or imprisonment. *Perry* v. *United States,* D.C. Cir., 195 F. 2d 37.

examination. Where the request for the mental examination is not frivolous or in bad faith, as it certainly was not in this case, "[t]he mandate of the statute appears to be absolute in its preliminary requirement" that the Court shall cause the accused to be mentally examined. *Krupnick* v. *United States,* 8 Cir., 264 F.2d 213, 216; *Lewellyng* v. *United States,* 5 Cir., 320 F.2d 104; *Hansford* v. *United States,* D.C. Cir., 365 F.2d 920; *Whalen* v. *United States,* 5 Cir., 367 F.2d 468. The statute does not refer to any preliminary determination by the Court as a basis for deciding whether to require the psychiatric examination. *Meador* v. *United States,* 9 Cir., 332 F.2d 935. If such reasonable cause is claimed to exist, the Court cannot, as the trial judge did here, perfunctorily dispense with the mandatory requirement of a psychiatric examination. Indeed, such an examination must be afforded even during the trial if the defendant's conduct in the courtroom raises a suspicion as to his competency. *Pouncey* v. *United States,* D.C. Cir., 349 F.2d 699. Here, the trial judge had the opportunity for such examination, even before the jury was selected. If the preliminary examination indicates mental incompetency, the Court must then conduct an evidentiary hearing, and thereafter make findings with respect to the defendant's competency.

Here, rather plainly, the whole substance of a statute of Congress, concerned with the civilized avoidance of trying and convicting an insane person, was disregarded and violated.

VIII. Refusal of Trial Judge To Grant Other Petitioners a Severance From Dranow Even Though: (A) Two Letters Written by Dranow Were Extremely Prejudicial to the Other Petitioners Against Whom Such Letters Were Clearly Inadmissible; and (B) Further Irreparable Prejudice Was Caused the Other Petitioners by Dranow's Irrational Conduct During the Trial

A. One aspect of the question presented under this heading is whether the disclosure to the jury of some of the damaging content of the Link-Dranow letters was so prejudicial to petitioners that such prejudice could not be cured by an instruction to the jury to disregard such content. The letter in which Dranow asked for payments mentioned three petitioners by name. (Tr. 14399). The other letter, in which Dranow offered to take the blame "to protect others," damaged all petitioners. (III D.A. 1910-1914). Further, the newspaper report on the letters, carried around by the jury foreman, described those letters as referring to "co-defendants." (see p. 22, *supra*) The dissenting judge below, noting that the jury foreman had been strongly impressed by the Government's attempt to introduce these letters, found them so prejudicial that only a severance could cure the taint of the prejudice:

> "There is only one answer to this question. The letters were inherently prejudicial to all defendants. Together they conveyed a strong inference of guilt of all; as to those named in the second letter, the inference was inescapable that they were guilty of some misconduct for which they could be blackmailed for an indefinite period of time. Asking a jury to compartmentalize or disregard such evidence was an impossible task. There can be little doubt that the prosecutor's efforts to impeach Dranow in this manner were in fact attempts to inject highly inflammatory ma-

terial into the case prejudicial to all the defendants. The courts have consistently held that the harm thus created cannot be undone by instructions from the trial court." (App. A, *infra*, pp. 38a-39a).

As has been noted in this Court:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (concurring opinion).

The decision of the Court below on this point cannot be reconciled with decisions in other circuits, nor with decisions in the Seventh Circuit: *United States* v. *Haupt*, 7 Cir., 136 F.2d 661; *United States* v. *Bozza*, 2 Cir., 365 F.2d 206 (1966); *Holt* v. *United States*, 10 Cir., 94 F.2d 90; *Scott* v. *United States*, 5 Cir., 263 F.2d 398; *United States* v. *Clarke*, 3 Cir., 343 F.2d 90; *United States* v. *Kelly*, 2 Cir., 349 F.2d 720, cert. den., 384 U.S. 947; *United States* v. *Echeles*, 7 Cir., 352 F.2d 892; *United States* v. *Goss*, 4 Cir., 329 F.2d 180; and *cf. Kotteakos* v. *United States*, 328 U.S. 750, 764-65.

B. The prejudice to other petitioners from having to stand trial with Dranow was substantial. Petitioners were incurably prejudiced by Dranow's self-destructive and incriminating testimony and conduct. (For detail, see pp. 36-53).

When the prejudice to petitioners from joint trial with Dranow became apparent, the trial judge should have granted a severance from Dranow. His refusal to do so denied such petitioners their basic right to a fair trial.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM 1965 — APRIL SESSION 1966

Nos. 14892, 14893, 14894, 14895,
14896, 14897 and 14898

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

JAMES R. HOFFA, BENJAMIN DRANOW, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, CALVIN KOVENS, and SAMUEL HYMAN, *Defendants-Appellants*.

Appeals from the United States District Court
for the Northern District of Illinois.

October 4, 1966

Before DUFFY, *Senior Circuit Judge*, CASTLE and SWYGERT, *Circuit Judges*.

DUFFY, *Senior Circuit Judge*. The appellants herein were indicted on June 4, 1963, on twenty-eight counts. The first twenty-seven counts charged substantive violations of the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343). The twenty-eighth count charged a conspiracy to commit the substantive offenses. The jury convicted all appellants on the conspiracy count, and each appellant on certain of the substantive counts.

The Court directed a judgment of acquittal of all defendants on Counts 2, 5, 11, 26 and 27. The Government dismissed Counts 10 and 18.

Except for the interstate transmission or mailing involved, the allegations of each of the first twenty-seven counts are, for all practical purposes, identical, alleging the same scheme to defraud the Central States, Southeast and Southwest Areas Pension Fund, often referred to in

the record as the Teamsters Pension Fund or just the Pension Fund.

The indictment charged and the proof showed that defendant James R. Hoffa was president of the Teamsters International Union,[1] president of Local 299 of the Teamsters Union in Detroit,[2] and also a trustee of the Teamsters Pension Fund.

The indictment charged that the defendants conspired and did "devise a scheme and artifice to defraud the Pension Fund . . . by means of false and fraudulent pretenses, representations and promises by submittting false and misleading statements of material fact and by concealing material facts in order to obtain loans from the Pension Fund; and diverting, through various fraudulent devices, substantial amounts of the loan proceeds for their personal use and benefit."

The indictment described the alleged scheme in some detail including the following: Defendants Dranow and Burris contacted prospective loan applicants and obtained employment as their agents for procuring Pension Fund loans. Dranow and Burris induced the prospective loan applicants to retain them by holding themselves out as being in a specially favored position to obtain Pension Fund loans because of their special relationship with defendant Hoffa. Hoffa and Kovens referred some of these prospective loan applicants to Dranow and Burris. Among the loan applicants involved were defendants Strate and Hyman.

The indictment further charged that Dranow, Burris, Strate, Hyman and Kovens participated in the preparation and submission of inflated loan applications to the

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[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[2] Truck Drivers Local 299, Detroit, Michigan.

Pension Fund; that these applications contained material falsifications and concealed material facts and that defendant Hoffa made misrepresentations to and concealed material facts from the trustees and staff members of the Fund.

The indictment further alleged that all of the defendants enriched themselves by causing more than $1,000,000 of the fraudulently obtained loan proceeds to be diverted to purposes other than those approved by the Pension Fund trustees. In addition, the defendants, by their participation in the scheme, allegedly obtained stock options, fees and contracts for services, construction fees, and ownership and control of borrowing corporations.

The indictment charged that in disposing of some of the diverted loan proceeds, the defendants applied more than $100,000 to the repayment of debts incurred by Sun Valley, Inc., a Florida real estate corporation, in which Hoffa had a substantial secret interest. Repayment of these debts enabled Sun Valley to extricate itself from reorganization proceedings under Chapter X of the Bankruptcy Act. Included among the Sun Valley debts that the diverted proceeds assisted in repaying was $400,000 owed by Sun Valley to a Florida bank. Repayment of this Sun Valley debt enabled Hoffa to withdraw from the Florida bank $400,000 of Teamster money which Hoffa had deposited in a non-interest-bearing account at the bank as security for the bank's $400,000 loan to Sun Valley.

Separate counts of the indictment contained allegations of the mailings, telegrams and telephone calls by which the alleged scheme was furthered. The indictment concluded by charging that all of the defendants conspired together to devise and carry out the scheme.

At the trial, the Government presented testimony and documentary evidence tending to prove the charges made in the indictment. As often happens, where a number of defendants are charged and convicted of participating in

a conspiracy, counsel for appellants will present their arguments based largely on testimony favorable to or given by their clients, while completely ignoring other testimony of a contrary nature. They will, perhaps, give lip service to the well-established doctrine and rule that in resolving the issue of sufficiency of the evidence to sustain a conviction, an appellate court must view the evidence and the reasonable inferences which may be drawn therefrom in the light most favorable to the Government. *Glasser* v. *United States,* 315 U.S. 60, 80; *United States* v. *Mims,* 7 Cir., 340 F.2d 851, 852. But, after giving such lip service, the rule often is ignored. We feel that is true in the instant case.

The Government offered proof which was received in evidence as to a number of specific transactions in which various of the defendants were involved. In all of these transactions except No. 1, loans were made by the Teamsters Pension Fund. These transactions were designated as:

1. The Florida Bank-Sun Valley transactions;
2. The Connelly-Everglades transactions;
3. The Strate-Pelican Fontainebleau transactions;
4. The Hyman-Key West Foundation transactions;
5. The First Berkeley transactions;
6. The Kovens-Sager-Good Samaritan Hospital transactions;
7. The Kipnis-Causeway Inn transactions;
8. The Simon-airport hotel transactions;
9. The Streeker-4306 Duncan transactions; and
10. The Dioguardi-Club 300 loan.

Within the limits of this opinion it is not practical to discuss in any detail all of the various transactions here-

inbefore listed, nor the part played in each by the various defendants. Therefore, we shall not refer in detail to more than two of these transactions.

The Government offered proof which tended to show that the scheme or conspiracy commenced in 1958 when defendant Hoffa began his efforts to rescue Sun Valley, Inc. from insolvency and thus, so the Government argues, to protect himself from possible charges that he had been misusing Union funds.

Sun Valley, Inc. was a real estate promotion in Florida. It was planned that lots in the Sun Valley project would be sold to members of the Teamsters Union as well as to others. Henry Lower, a former Teamster employee, was the president of Sun Valley. Hoffa promoted Sun Valley lot sales at Teamster meetings and had an option to purchase 45% of the Sun Valley stock. Hoffa also had countersigned $75,000 worth of Sun Valley notes of which a total of $25,000 were outstanding and unpaid. He also owned a number of lots within the project.

After Henry Lower's death, an instrument bearing Hoffa's signature was found in a cookbook in Lower's desk by his son. This document disclosed that Lower held 22½% of Sun Valley stock in secret trust for Hoffa. Although Hoffa denied that it was his signature on the document, handwriting experts at the trial testified that it was genuine.

In 1956, Sun Valley was in need of funds. The property was mortgaged. When Sun Valley applied to the Florida National Bank for loans, the bank insisted that Hoffa's local Union No. 299, at all times, maintain on deposit in the bank, a restricted non-interest-bearing account, in a sum equal to the amount of the Sun Valley borrowings. Hoffa then deposited money belonging to the Union and

the bank immediately made loans to Sun Valley equalling the amount of the Union deposits.[8]

From July 1958 to July 1960, Sun Valley, being unable to meet its bills, was involved in a reorganization proceeding under Chapter X of the Bankruptcy Act. During this period, Sun Valley owed Florida National Bank $399,000 and Hoffa's Detroit Local had $400,000 tied up in the "restricted" account at the bank. On three occasions during 1959, Hoffa tried to withdraw the Detroit Local's $400,000 but the bank would not honor the checks.

Under the heading "The 'Bail-Out' Effort Begins," the Government cites negotiations with one Sanson, and offered proof to show that Sanson, a Florida business man, had a large loan application pending before the Teamsters Pension Fund trustees. In the summer of 1958, Dranow told Sanson that his loan would be put through if Sanson paid a substantial "fee" to him. Sanson agreed to do so, but told Dranow that the "fee" would be paid by check which would contain an explicit reference to the true purpose of the check. Apparently Dranow then lost interest and terminated the conversation.

In July 1958, Dranow and Hoffa jointly called Sanson on the telephone. Hoffa, in Dranow's presence, proposed that if Sanson would "straighten out" Sun Valley, Sanson's pending Pension Fund loan application would be granted. Hoffa suggested to Sanson that he (Sanson) would be able to obtain additional Pension Fund loans for the Sun Valley project. Hoffa said "that this was a must proposition for him, that it was something that had to be done. . . ."

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[8] On June 20, 1956, Hoffa deposited $300,000 of Teamsters funds in the restricted account. The bank loaned Sun Valley $300,000 on the same day. On November 17, 1956, Hoffa deposited an additional $200,000 of Teamsters funds, and two days later the bank loaned Sun Valley an additional $200,000.

Dranow and his financial agent, defendant Weinblatt, met with Sanson,[4] but Sanson turned down Hoffa's proposal.[5] The Pension Fund rejected Sanson's loan application.

In September 1958, defendant George Burris incorporated Union Land and Home Company for the purpose of rescuing Sun Valley. Burris was acting as a "front" for Dranow, and Hoffa knew of Dranow's concealed interest in the Company. Hoffa and Burris agreed that Union Land and Home Company would pay off a promissory note which Hoffa had cosigned for Sun Valley, and reimburse the Teamsters Detroit Local for the interest which the Local had lost as a result of having its $400,000 tied up in the "restricted account." In exchange, Hoffa agreed to give up his Sun Valley stock option. No mention was made of Hoffa's secret agreement with Lower.

THE CONNELLY-EVERGLADES TRANSACTIONS

One Vaughan Connelly owned the Everglades Hotel in Miami. He sought a Pension Fund loan to finance renovation of the hotel by defendant Kovens, a Miami contractor. Kovens said he would bring in a man "who could secure the loan with the Teamsters . . . a little man . . . who always seemed to be able to deliver the goods." He brought in Dranow, introducing him as "Grossman." Dranow, in turn, brought in Burris and introduced him as an accountant for the Pension Fund who "handled all his Teamster loan applications."

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[4] Dranow brought Kovens and Burris to meet Sanson. He introduced Burris as a man who had "great influence" with the Teamsters.

[5] Sanson wrote a report on the Sun Valley development. He recommended its abandonment and suggested that its continuance would violate the "moral obligations" owed by the promoters to the Teamster members buying lots in the project.

During August and September 1958, Connelly discussed the proposed loan with Kovens, Dranow and Burris. The latter helped prepare the loan application. Dranow asked a $300,000 fee for procuring a $3,300,000 loan. Connelly agreed.

In January 1959, the Pension Fund trustees, including Hoffa, granted the loan, and Connelly received his first million dollar draw. Dranow and Kovens told Connelly the fee would have to be paid "under the table" in "small bills" and at once. Reference was made to the fact that "Hoffa was raising hell, ..." Dranow then got excited and told Connelly he hoped the latter would not be harmed. "These boys play rough" said Kovens.

The following day, Connelly took $100,000 in small bills to Kovens and Dranow. The inference is strong that these bills were from the proceeds of the Pension Fund loan. Kovens burned the money wrappers. Dranow stuffed the cash into a bag and left to go "to Washington to deliver the money to the Boss."[6]

Throughout the spring of 1959, Connelly made additional "fee" payments to Kovens and Dranow. In May 1959, Dranow told Connelly "to keep out of sight" because the McClellan Committee investigators were in Miami "trying to link up Dranow and . . . pension loans with the Teamsters and with Mr. Hoffa." Kovens suggested that Connelly leave the country, but Connelly refused to do so.

However, when Committee investigators interviewed him, Connelly denied that he had made pay-offs for his Pension Fund loan. Connelly told Kovens, Burris and Dranow that he had lied to the investigators. Dranow said Connelly "had stood up for Mr. Hoffa." Later, Hoffa, re-

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[6] At this time, both Dranow and Hoffa were living at the Woodner Hotel in Washington.

ferring to Connelly's denial, told Connelly that it was "a fine statement."

By late spring of 1959, Connelly was again short of funds. Dranow told him he could get him another million dollars from the Pension Fund "but it was going to cost . . . more money than the other one. . . ."

Dranow and Burris helped Connelly on his second loan application. A loan to Connelly of $1,000,000 was approved on Hoffa's motion subject to certain conditions which had not been fulfilled. At the end of a regular meeting of the Pension Fund trustees, Hoffa called what the Government has characterized as a "rump session of the Pension Fund trustees" and told them "Connelly has got to have his check today." Thereupon, Connelly got his million dollar check.

By January 1960, Connelly was once more short of money. He discussed his inability to pay his debts with Hoffa and Dranow. Connelly prepared a letter requesting a Pension Fund moratorium on all of his loan payments. Hoffa told him to make the letter stronger and get it to the Fund prior to its March 15th meeting. Hoffa told Connelly to stay away from the meeting saying "I'll call you if I need you." At the March 15th meeting, on Hoffa's motion, the Fund trustees voted for the moratorium.

In April 1960, Connelly appearing before a federal grand jury investigating Sun Valley and Pension Fund pay-offs, denied making any pay-offs in connection with his loans. Later, he told Dranow that he had lied to the grand jury. Two months later, the Pension Fund foreclosed its mortgages on Connelly's hotel.

The evidence disclosed that Connelly had paid almost $400,000 in "fees" in connection with his loans and proof was made, which the jury was entitled to believe, that $15,000 of this money went into what the Government called "the Sun Valley bail out."

STRATE-PELICAN-FONTAINEBLEAU TRANSACTIONS

Defendant Strate was one of the principal owners of the Pelican Corporation which was constructing the Fontainebleau Hotel in New Orleans. Difficulties in financing were encountered as the building was being erected on leased land. The Pension Fund twice had rejected applications, Hoffa explaining "We cannot see the leased land."

In April 1959 representatives of Strate contacted Kovens who referred them to Dranow who later instructed them to provide $175,000 in "small bills and old money" in a safety deposit box.[1] This was done. Dranow promised to deliver at $1,350,000 Pension Fund loan for a "fee" of only $155,000. Strate and his partners agreed to the terms.

On June 6, 1959, Strate applied to the Pension Fund for the loan. He appeared before the Board of Trustees, being introduced by defendant Hoffa who made no mention of the "leased land" problem. In July, the Board approved the $1,350,000 loan. Within a month, Strate delivered $155,000 "in old small bills" to Dranow. This "fee" was funded by the proceeds from the Pension Fund loan.

In October 1959, Strate applied for a $2,325,000 Pension Fund loan "to build an addition to" the Fontainebleau. During these negotiations, Strate made a number of misrepresentations to the Pension Fund Board.

Between March 1960 and November 1961, Pelican received $3,350,000 in Pension Fund construction loan proceeds but only about $3,104,000 was used on the new construction. Over $200,000 was used by Strate for stock purchases, repayment of loans and payments to himself.

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[1] The arrangements for $175,000 in small bills to be placed in a safety deposit box originally had been made for Attorney Cohen prior to any contact between Strate and Dranow. However, Strate or his representatives went along with the small bills-safety deposit box procedure.

The Government offered evidence to support its claim that almost $50,000 can be traced through Dranow and Weinblatt into "the Sun Valley bail out."

WAS THE EVIDENCE SUFFICIENT TO ESTABLISH THE CONSPIRACY AND THE CONNECTION OF EACH DEFENDANT WITH IT?

The Government had the burden to prove that the defendants conspired to and did devise a scheme to defraud the Pension Fund by submitting false and fraudulent representations and concealing material facts from the Pension Fund trustees and staff in order to obtain Pension Fund loans. It also had the burden of showing that defendants used the mail and wire services in aiding the execution of the scheme.

The burden also rested on the Government to demonstrate that the central object of the conspiracy was to obtain money for the purpose of "bailing out" Sun Valley, and that each defendant had knowledge of the conspiracy and scheme. *United States* v. *Falcone*, 311 U.S. 205; *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711.

Each defendant strongly insists that the evidence did not establish the existence of such a scheme and further argues that even conceding the existence of such a scheme or conspiracy, the evidence did not connect him with it.

Although the Government was required to establish one conspiracy rather than a series of separate conspiracies, *Kotteakos* v. *United States*, 328 U.S. 750, the fact that a conspiracy's various members may play different roles in executing it, and have dissimilar motives for participating in it, does not mean that a single conspiracy does not exist.

We hold the proof in this case was sufficient for the jury to find that a single conspiracy did exist and that each defendant was a knowing member of it; that Hoffa's primary concern when the conspiracy was formed and the

central purpose of the conspiracy and scheme was to "bail out" Sun Valley. Further, that Dranow, Kovens and Burris knowingly assisted Hoffa in this effort which resulted not only in the rescue of the Sun Valley project, but also in their receipt of cash payments and other emoluments.

Strate and Hyman were borrowers whose object in joining the scheme was to get large loans for their projects. Kovens, in the Good Samaritan transactions, and Burris in the First Berkeley transactions, would also fit into the borrower category. It seems clear that the borrowers' need for large loans was so great that they were willing to pay the price of joining the conspiracy. Applicable is the statement in *Blumenthal* v. *United States*, 332 U.S. 539, 559, that all the defendants ". . . knew of and joined in the overriding scheme" and that "All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end. . . ."

To find defendant Hoffa guilty, it was not necessary for the Government to prove that he knew every detail of the arrangement between Dranow, Burris, Kovens and the borrowers. It also was unnecessary for the Government to prove that the borrowers knew the details of other loans placed through Hoffa for the evidence was sufficient to support the jury's finding that all had a stake in the common venture.

Defendant Hoffa urges that the Pension Fund did not actually lose money on the loans involved in this case. However, due to the long term nature of the loans and the fact that subsequent loans were made to refinance earlier loans, it was impossible to ascertain with certainty whether or not a loss occurred. In any event, it is well established that actual loss is not an essential element of the crime. *United States* v. *Sylvanus*, 7 Cir., 192 F.2d 96, 106.

The Fontainebleau Hotel loans illustrate the defendants' involvement in procuring otherwise doubtful

Pension Fund loans for applicants who were willing to pay the price, and also demonstrate how loans were granted which, undoubtedly, would not have been made if all the actual facts had been known.

Strate and his group had twice failed to obtain loans from the Pension Fund due to the fact that their hotel was being built on leased land. However, when Dranow and Burris intervened, and Dranow was promised a fee of $155,000, the loan was approved.

A second loan of $2,235,000 was made to Strate and his group for additional construction on the Fontainebleau Hotel. The Government offered proof to show that during the negotiations for that loan, Strate made false representations to the Pension Fund trustees regarding past and future expenses and the presence of the requisite owner's equity.

The Government also proved that defendant Hoffa called the Pension Fund appraiser and informed him that although the owner's equity requirement had not yet been met for the above loan, the applicants would be able to meet it within sixty days. Seventeen days later, the Pension Fund issued its letter of commitment granting the full $2,350,000 loan.

The type of misrepresentation found in connection with the granting of the Fontainebleau loan is illustrative of those made in connection with other loans in this case.

Defendant Hoffa argues that his interest in helping Sun Valley was motivated only by his desire to help the Teamsters, but the jury apparently was unimpressed by his protestations of good faith. It was entitled to believe the testimony that Hoffa considered the "bail out" of Sun Valley, a "must proposition." From the evidence submitted, it undoubtedly rejected Hoffa's proffered motive and concluded that Hoffa's interest in "bailing out" Sun Valley was generated by other considerations.

One of these considerations was Hoffa's financial interest in Sun Valley discussed above. Another and perhaps far more important one which the jury could have considered, was Hoffa's use of $400,000 of Teamster money to secure Sun Valley's financial position. The jury could have concluded that in light of the McClellan Committee investigation, Hoffa was most anxious to get this money out of the Florida bank and return it to the Union Local. This conclusion may have been further buttressed by the testimony that Hoffa had congratulated Connelly for lying to the McCellan Committee about the Pension Fund loan pay-offs.

Finally, Hoffa's claim of good faith interest in Sun Valley runs afoul of the fact that his secret connection with Sun Valley could properly be regarded as a violation of his fiduciary duties to the beneficiaries of the Teamster Pension Fund.

Dranow's connection with the scheme is clearly evident. He took an active part in the conspiracy at every step. He was active in placing all the larger loans. He succeeded in obtaining substantial amounts of money for himself and his claim that he sought only legitimate finders' fees apparently did not ring true to the jury. His insistence on his fees from Connelly and Strate being paid in "small old bills" and having Connelly falsify to the McClellan Committee as to the Everglades loan, all belie his claimed innocence.

It is not necessary to discuss Dranow's attack on the substantive mail counts, as his conviction on the conspiracy count sustains the sentence imposed on him. *Lowe v. United States*, 325 U.S. 339, 350.

Defendant Burris argues he was also merely engaged in the legitimate business of obtaining finders' fees for placing loans. However, the evidence discloses that Burris was involved far beyond an interest in legitimate

finders' fees. Dranow introduced Burris to Connelly as the accountant who handled all of his Teamster loan applications. The jury was entitled to believe that Burris was a co-conspirator who had an active part in obtaining fraudulent loans from the Pension Fund, using the proceeds of inflated loans to help extricate Sun Valley as well as to make a profit for himself. Burris took an active part in the Everglades loans to Connelly and the Key West loan to Hyman. Furthermore, Burris became the accountant for the Strate Fontainebleau group at the time they were applying for a second loan.

Defendant Kovens was not involved in all of the transactions proved. However, there was sufficient evidence for the jury to conclude that he was a knowing member of the conspiracy and scheme to defraud the Pension Fund.

As early as July 1958, Kovens brought up the possibility of Connelly taking over Sun Valley. He later introduced Connelly to Dranow whom he called "Grossman," as an individual who could secure Pension Fund loans. It was also Kovens who suggested to Connelly that he leave the country until the McClellan Committee investigators left town.

In addition, the Government offered proof of misrepresentations made by Kovens to the Pension Fund trustees in connection with the Good Samaritan Hospital loans, and showed that it was Kovens who brought Dranow into the Strate Fontainebleau Hotel transactions.

We find that the evidence would have warranted the jury in concluding that Kovens was involved in the conspiracy and scheme in numerous other respects.

Undoubtedly, defendant Hyman was principally interested in obtaining loans for his various business projects. However, we find that from the evidence, the jury could have concluded that Hyman was a member of the con-

spiracy, finding that he knew the price of obtaining a Pension Fund loan through Dranow and Barris was a finders' fee that would help Dranow and others to extricate Sun Valley.

Hyman admitted investing $100,000 in Union Land and Home Company, the company formed for the purpose of "bailing out" Sun Valley. He also advanced $50,000 to pay creditors of Sun Valley in May 1960. Evidence was offered to show that he was repaid for this advance out of the proceeds of a $400,000 Pension Fund loan. The application for this loan was made in the same month that Hyman made his advance to pay Sun Valley creditors.

The timing of the advance and the loan application is curiously coincidental. When the fact is added that Hoffa supported the loan with false statements, the inference readily appears that the granting of the loan was not on its merits, but as a result of a conspiratorial agreement.

The role of defendant Strate has been discussed above in connection with the Fontainebleau loans. The fact that he and his group had been unable to secure a Pension Fund loan until Kovens brought Dranow into the picture and agreed to pay the latter a finder's fee of $155,000 is significant. The loan went through on Hoffa's motion and Dranow notified the Strate group that the loan had been approved before it received formal notification. Considering all this, the jury could well have concluded that the loan was not made on the merits but as a result of the conspiracy.

Weinblatt was a lesser member of the conspiracy. He was Dranow's agent and his nominee of a number of bank accounts. He acted as such because Dranow wanted his own interest in these accounts concealed from investigators. The District Judge imposed a sentence of one hour in custody and a fine of $5,000. Although Weinblatt was

not of great importance in the scheme, the jury did have a basis for holding that he was knowingly implicated in the conspiracy.

QUESTION OF SEVERANCE

A number of defendants claim error because their motion for a severance was denied. However, as they were all part of one conspiracy, it was proper to try them together. *Blumenthal* v. *United States*, 332 U.S. 539; *Schaffer* v. *United States*, 362 U.S. 511, 514.

Hoffa and Kovens complain that it was prejudicial for them to have been tried with Dranow because the personality of the latter would naturally antagonize a jury. We do not think that this complaint amounts to error in view of the extremely close association of Hoffa and Kovens with Dranow in various loan transactions.

DENIAL OF SPEEDY TRIAL

Hoffa and other of the defendants claim they were denied their constitutional right to a speedy trial. There was a delay due to the Hoffa trial in Tennessee. The instant case went to trial on April 27, 1964, about six weeks after Hoffa's conviction in Tennessee, and some eleven months after the return of the indictment. The Tennessee indictment had been returned prior to the indictment in the instant case. Under the circumstances, we hold that there was no abuse of discretion on the part of the trial judge in postponing the trial, and we hold that defendants were not denied their constitutional right to a speedy trial.

ALLEGED ERRORS AT THE TRIAL

The trial of the instant case extended over a period of three months. At least six of the attorneys for the various defendants were actively engaged in the defense. It would have been quite unusual if some errors had not occurred during that extended period. However, as the

Supreme Court has stated, the test is that "A defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States*, 344 U.S. 604, 619.

We shall now consider and discuss a number of the alleged errors which the defendants claim to be prejudicial and which, they argue, require a reversal and a remand for a new trial.

ALLEGED ERROR IN THE SELECTION OF GRAND AND PETIT JURORS

Defendants Burris, Hoffa and Kovens claim that the manner in which the grand and petit jurors were selected constituted prejudicial error. They claim that these jurors were improperly drawn because the Jury Commissioner did not participate in the drawings* and because the names were not read alond as they were drawn from the box.

The challenge to the grand jury array has been waived by laches. Defendants were arraigned on June 25, 1963. They indicated a willingness to forego all pretrial motions if they were granted an immediate trial. The trial judge explained that a trial date was not possible until the coming fall, and granted them twenty days to file any motions. Many motions were filed seeking discovery, bill of particulars, severance, and attacking the indictment in whole or in part. The case was called for hearing on March 23, 1964. On April 9, 1964, a motion was filed challenging the petit jury array. It was not until April 13, 1964, that a motion was filed challenging the grand jury array. This was an unreasonable delay. *Hyde* v. *United States*, 225 U.S. 347, 373. It was filed after the time permitted by Rule 12 (b), F.R. Cr.P.

28 U.S.C. § 1864, provides that the names of the jurors "shall be publicly drawn from a box containing the names

*28 U.S.C. Section 1864 requires participation by the Commissioner in the placing of names in the jury box, but there is no provision as to the person who must draw the names from the box.

of not less than three hundred qualified persons at the time of each drawing." Pursuant to the practice in the District Court, the clerk of court assisted by two deputies, drew the jury panel. Defendants requested that the names drawn for the petit jury be read aloud. The trial judge held that such a procedure would not be necessary in order for the drawing to be a public one under § 1864. To insure that the potential jurors would not be approached by either the Government or defendants prior to the selection of the jury, the Judge ordered that until the voir dire, their names were not to be disclosed to counsel on either side, the marshal or the court itself. The list was locked in the clerk's vault. 28 U.S.C. § 1864 requires that the jury be publicly drawn, but it does not require nor do we interpret it to mean that the names must be read aloud. No efforts were made to keep secret the fact that a jury was being drawn. The trial judge was, undoubtedly, extremely sensitive to the idea of possible jury tampering, and was taking extra precautions so that the prospective jurors would remain free from any contamination. We hold prejudicial error was not committed in following the procedure here outlined.

DEFENDANTS CLAIM ERROR DUE TO EMPANELLING PROCEDURES

Certain of the defendants claim prejudice because the court limited the defendants to eighteen peremptory challenges; also, because they were not permitted to ask certain questions of the potential jurors, and because the trial judge at first limited their time with each veniremen, and later took over the questioning himself.

The selection of the jury in this case consumed ten court days. Over 100 veniremen were questioned on the voir dire before the twelve jurors and four alternates were chosen. The Federal Rules of Criminal Procedure entitle non-capital defendants, whether tried singly or jointly, to no more than ten peremptory challenges as a matter of right. There

is no constitutional or statutory right to a greater number. *Stilson* v. *United States*, 250 U.S. 583, 586-7; *Schaefer* v. *United States*, 251 U.S. 466, 470.

Defendants also complain that they were not permitted to inquire into certain subjects such as the political affiliations of the prospective jurors, or whether a venireman had ever crossed a Teamsters picket line.

We hold that under the circumstances present, and considering the length of time consumed in the process of selecting jurors, the trial court acted within its discretion in foreclosing inquiries which seemed to be of a dilatory nature.

As to the judge taking over the examination of potential jurors, a defendant in a criminal case does not have a right to have his counsel question each venireman on the voir dire. *Paschen* v. *United States*, 7 Cir., 70 F.2d 491, 495. Furthermore, Rule 24 (a), F.R.Cr.P., permits the trial judge, in his discretion, to conduct the examination himself. This rule has been held to not violate any constitutional right of a defendant. *Hamer* v. *United States*, 9 Cir., 259 F.2d 274. We find no error with respect to the manner in which the jury was selected.

PREJUDICIAL PUBLICITY

All defendants claim they were prejudiced by publicity directed toward the defendant Hoffa, charging much of this publicity was generated by the Government. Particular complaint is made of the public clashes between the then Attorney General, Robert F. Kennedy, and the defendant Hoffa.

Defendants argue that the trial court failed to take adequate action to protect them from various kinds of prejudicial publicity. They assert that during the period of the jurors' selection, Look Magazine published a story concerning an alleged plot by Hoffa to assassinate Robert F. Ken-

nedy, and that shortly thereafter, Life Magazine ran a similar article.

Selection of jurors commenced on April 27, 1964, and continued to May 11. On May 1, Attorney General Kennedy spoke at a Law Day observance at the University of Chicago. During a question and answer session with students after the speech, Kennedy admitted he had heard the charges made by one Edward G. Partin that Hoffa was interested in the suggested assassination of him. Although the Attorney General's answer was not given in an interview with the press, a news story based on the statement did appear in the newspapers.

Whenever any person of prominence is charged with a crime, the story usually will receive wide distribution through various news media. It may be impracticable to postpone the trial for a period long enough for public interest to die down. As the Ninth Circuit Court of Appeals said of Dave Beck (*Beck* v. *United States*, 298 F.2d 622, 628)— ". . . it seems obvious that it would be impossible ever to bring this defendant to trial if it were necessary to await a complete abatement of all publicity concerning a man so much in public view."

The fact that a juror may have read newspaper accounts or heard comments on radio or television relative to a criminal charge is alone not sufficient ground for excusing a prospective juror. *Finnegan* v. *United States*, 8 Cir., 204 F. 2d 105, 110. It is not required that jurors be totally ignorant of the facts and issues involved. *Irvin* v. *Dowd*, 366 U.S. 717, 722. In the latter case, the Supreme Court said at page 723—"To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

The voir dire examination is the proper place to determine whether a defendant's public notoriety has resulted in a prospective juror's prejudice. Although counsel for defendants complain that they were unduly restricted on the voir dire, we do not think this is true. Some ten court days were consumed in obtaining the jurors who sat on this case. As each panel of veniremen entered the box, the trial judge informed them that only those who could put aside any past opinions and reach a decision entirely on the evidence presented in court were desired as jurors. Each veniremen was asked if he could do so, and those who expressed any doubt as to their ability in this regard, were excused.

A reading of the transcript of the proceedings extending over a two weeks' period is convincing that the jurors selected were not prejudiced by publicity as to Hoffa or otherwise.

JURY SEQUESTERED AT GREAT LAKES NAVAL STATION

The sequestered jury was taken from a downtown Chicago hotel and removed to the Bachelor Officers' quarters at Great Lakes Naval Station. All of the defendants claim such action was error, and the defendant Hoffa suggests that the jury was kept "... under virtual military imprisonment [which] was violative of the Fifth [due process] and Sixth [public trial] amendments." Hoffa further argues that such a sequestration "... is patently at odds with the basic American tradition deploring any interference by the military with the regular administration of justice in the civil courts."

We hold that in view of the notoriety given to the trial, sequestration of the jury was entirely proper. Furthermore, the trial judge knew of recent charges of alleged jury tampering and naturally thought it advisable to keep the jury isolated.

The quarters at the Great Lakes Naval Station were separate and comfortable. They were within one hour's drive from the federal courthouse. The jury could more easily be kept isolated at these quarters than in a crowded downtown hotel where jury contact with hotel employees such as bellboys and elevator operators would necessarily be frequent.

The place where the jury was to be kept was within the sound discretion of the trial judge. We hold that there was no abuse of that discretion and that there was no error committed by reason of quartering the jury during the trial at the Great Lakes Naval Station.

JUROR LEE WAS EXCUSED

Near the close of final arguments, the trial judge received information from the attending doctor that the ninety-two year old mother of Juror Lee had undergone major surgery for a broken hip, and that he did not expect her to leave the hospital alive. The Judge asked the parties whether they wished to continne with eleven jurors in the event of the lady's death during deliberations, or whether they would prefer to have the first alternate juror replace Lee before the deliberations began.

Counsel for defendants suggested that Lee be consulted as to whether he wished to be excused, but if the Court refused to do so, they would prefer proceeding with the alternate juror substitution. The trial judge did not desire to consult with Juror Lee and did not do so. He excused Lee, and the trial proceeded with the first alternate juror sitting as a member of the panel.

We hold the trial judge did not err in excusing Juror Lee without having consulted him as to whether he wished to be excused.

SUBMISSION OF COPY OF INDICTMENT TO JURY

During the deliberations of the jury, its foreman handed the Deputy Marshal in charge a sealed document which was delivered to the Court. The document requested information, but was ambiguous as to what specific information the jury desired. It referred to "work papers" and mentioned "document of all counts," "document of law on all counts" and "document of overt acts named." Several rows of numbers were also listed, apparently indicating the twenty-one counts then remaining in issue and the seven counts which had been dismissed.

As seven of the twenty-eight counts had been dismissed, the jury may well have been in doubt as to which were the seven counts no longer in the case. However, upon reading the jurors' request, the trial judge told the Deputy Marshal to give a copy of the entire indictment to the jury and to tell them "they can have this [the indictment] and nothing more." None of the defendants or their attorneys were then present. The Deputy Marshal gave the indictment to the jury and related the Court's oral message.

It was later discovered that the copy of the indictment which had been sent in to the jury, contained certain ink markings. The Court indicated that it had not placed these markings on the copy of the indictment at the time it was sent to the jury room.

The principal marking on the indictment was the word "out" written immediately after the subheads of count 5, count 10, count 11, count 18, count 26 and count 27. All of these counts either had been stricken by the Court or dismissed by the Government.

The only other marks on the copy of the indictment were lines drawn through the name of Herbert R. Burris who had been dismissed from the case, and two small markings near Hoffa's name in a sentence relating to a telephone call between Hoffa and one Maurice A. Lieber-

man. It would appear that the markings on the copy of the indictment were made by some member or members of the jury, and were in no way prejudicial to Hoffa or the other defendants.

It is urged, however, that the trial court committed reversible error in communicating orally with the jury and in sending in the copy of the indictment in the absence of defendants and their attorneys. Defendants insist that the trial judge stated he would notify the parties and their counsel if any questions were asked by the jury during deliberations.

Undoubtedly, the trial judge assumed that it would assist the jurors to have the indictment before them so as to enable them to relate the counts of the indictment to the various transactions. The trial judge knew this would be a problem and earlier had suggested a form of verdict which would have identified the counts, such as putting "Everglades" at the top of Count 2. However, defendants objected and this was not done. The Court asked for suggestions as to how the counts could be better identified for the jurors, but counsel for defendants had none.

In *United States* v. *Press, et al.*, 2 Cir., 336 F.2d 1003, a somewhat similar situation was discussed at page 1016. The Court said: "It is not improper for the court to read the indictment in its entirety or portions thereof to the jury (citations). Indeed, in protracted cases involving numerous counts such as this one, reference to the indictment often serves as a helpful guide in delineating the issues the jury may be called upon to decide. Similarly, it is not error to give the indictment to the jury for use during its deliberations (Citing cases). The decision to do so rests in the sound discretion of the court."

The defendants claim that the copy of the indictment transmitted new information to the jury, since in reading the indictment to the jury, the court had omitted certain portions. However, the Court repeatedly had advised the

jury that the charges in the indictment were not evidence of guilt. To illustrate, the Court told the jury "As you have heretofore been advised, the indictment which has been returned by a grand jury is not any evidence of guilt and must not be construed by you as such." Again, the Court pointed out in reading a portion of the indictment—"That these are mere allegations in the indictment which are not proof of anything." At another point the Court said to the jury—"Now, again, I tell you that the indictment in this case is no evidence of the defendants' guilt . . . You must not be prejudiced against the defendants because an indictment has been returned against them."

We note that counsel for defendant Hoffa had earlier indicated he wanted the jury to know that a number of counts had been dismissed and that other portions of the indictment had not been proved. He said the jury was entitled to know that the Government "flunked 25% of the course; that is, seven counts out of twenty-eight went down . . . ."

It was not good practice for the trial judge to have sent the brief message and indictment to the jury in the absence of defendants and their counsel, but it is obvious that the indictment was the only thing the Court sent to the jury whether or not anything was said. No further instructions were given as was the situation in the majority of cases relied on by defendants. See *United States* v. *Neal*, 3 Cir., 320 F.2d 533; *Evans* v. *United States*, 6 Cir., 284 F.2d 393, and *Rice* v. *United States*, 8 Cir., 356 F.2d 709, 717. Under the circumstances then present, we hold that the procedure now complained of was not prejudicial and does not warrant a reversal of defendants' convictions. *United States* v. *Compagna*, 2 Cir., 146 F.2d 524; *Walker* v. *United States*, DC Cir., 322 F.2d 434.

EVIDENCE OF HOFFA'S PRIOR CONVICTION

On May 9, 1963, Hoffa was indicted in the United States District Court for the Middle District of Tennessee on a charge that he had wilfully endeavored to influence, intimidate and impede petit jurors in the discharge of their duties in violation of Title 18 U.S.C. § 1503. The indictment in the Tennessee case was returned prior to the time that the indictment was filed in the instant case. The jury in the Tennessee case found Hoffa guilty of the charge, and the United States Court of Appeals for the Sixth Circuit affirmed. *United States* v. *James R. Hoffa*, 349 F.2d 20.*

In the instant case, defendant Hoffa took the stand in his own behalf. At the beginning of the cross examination, Hoffa admitted he had been convicted in March 1964 of endeavoring to obstruct justice by tampering with the federal district court jury, his verbatim answer being "Yes, by perjured testimony of an admitted kidnapper." Hoffa now claims the Court committed prejudicial error in permitting the Government to impeach him by adducing testimony of his conviction which was then pending on appeal.

The trial court relied on our decision in *United States* v. *Empire Packing Company*, 7 Cir., 174 F.2d 16, 20, cert. den. 377 U.S. 959. The panel or division of our Court in that case consisted of Judges Major, Minton and Wham. On this appeal, the Government likewise relies on *Empire Packing* and states that *Bloch* v. *United States*, 9 Cir., 226 F.2d 185, 188, is in accord.

Hoffa relies on our decision in *United States* v. *Levi*, 7 Cir., 177 F.2d 827 [Major, Minton and Duffy]—apparently considering that our decisions in *Empire Packing* and *Levi* are inconsistent. We do not agree.

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*The Supreme Court later granted certiorari limited to one question. *Hoffa* v. *United States*, 382 U.S. 1024.

In *Empire Packing* we said: ". . . An accused, taking the stand in his own defense, may be cross examined regarding a prior conviction for a felony as affecting his credibility (citing cases). The fact that Chapman's conviction for income tax evasion was pending on appeal, as brought out in the trial court, did not render the cross examination improper. Unless and until the judgment of the trial court is reversed, the defendant stands convicted and may properly be questioned regarding said conviction solely for the purpose of testing credibility. (Citing cases) . . . ."

In *Levi*, the Assistant United States Attorney asked Levi if he were the same Levi who was convicted a few days previously in a tax evasion case. We held this question was error because Government counsel knew or should have known that a judgment of conviction had not been entered in that case, and that the trial court still had the motion for acquittal under consideration. Judge Minton wrote a dissenting opinion expressing the view that there was no reversible error. The circumstances that surrounded the impeaching question in *Levi* are certainly distinguishable from those of the case at bar.

We cannot say that the trial court committed reversible error in following the law in this circuit. No authorities have been cited to us to convince us now that our previous decision in *Empire Packing* was erroneous.

An additional reason for finding no prejudicial error in the impeaching question is that Hoffa's experienced and able counsel did not object to the question when it was asked. In fact, in his closing argument to the jury, counsel said: "But the first thing that Mr. Bittman [Government Counsel] went to for Mr. Hoffa like, a grip, and *it is proper cross examination—I didn't object*—'Are you the James R. Hoffa who was convicted in Chattanooga?'" [Emphasis supplied] Counsel for Hoffa then told the jury that the Tennessee conviction was on appeal, and that the

Government's use of it for impeachment purposes indicated a lack of confidence in both the Tennessee conviction and in the instant prosecution.

Several of defendants' trial counsel including counsel for Hoffa had previously conferred with the trial judge requesting advice as to his ruling should any former convictions of the defendants be brought out on cross examination. The trial judge informed them that he would permit the Government to bring out the prior convictions on the authority of *Empire Packing*. It is, therefore, quite apparent from this and counsel's above comments to the jury that counsel for Hoffa deliberately decided not to enter an objection to the impeaching question. We hold that it was not reversible error to ask witness Hoffa if he had previously been convicted.

TESTIMONY OF ALTERNATE JUROR PARE

Defendants filed an additional and supplemental motion for a new trial based upon information coming to them through alternate juror Pare. At a hearing held after the jury had returned its verdict and had been dismissed, Pare testified that during the trial, a member of the jury had shown him a Chicago newspaper article concerning the trial court's exclusion of the Link-Dranow letters discussed *infra*. Pare testified he had read the article but that no conversation had occurred in connection with it.

It appears that while the jury was at Great Lakes Naval Station, newspapers were available to them. However, any articles referring to the trial of the instant case were cut out before the jurors received the papers. We surmise that the article in question was missed because of its inconspicuous placement between the obituary column and the church announcements.

There was no evidence of any outside influence on the jury and from Pare's testimony, it appears that, for the most part, the jurors followed the Court's admonition not

to discuss the case among themselves until the case was finally submitted to them for decision. We think, under all of the circumstances present, that these matters brought to the attention of the trial judge after verdict were not sufficient to require an inquest by the Court or the granting of a new trial. We find no error in the Court's refusal to call back the jury for examination or in its denial of a new trial.

ALLEGED ERRORS AS TO RECEIPT AND EXCLUSION OF EVIDENCE

The defendants urge numerous claims of error based upon the admission or exclusion of evidence. Perhaps the alleged error most strenuously urged by defendants relates to the Link-Dranow letters.

On cross examination, defendant Dranow was asked if he had written a letter to George Burris stating "Everything can be blamed on me, and everything that could be put on me to protect the others should be blamed on me. . . ." Dranow answered he did not recall writing the letter although it was in his handwriting.

Dranow was then asked if he had written a second letter designating certain persons including some of the defendants, who should put aside sums of money ranging from $5 to $15 per day, to be eventually turned over to him. Upon objections, the Court instructed the jury to consider this matter only as to Dranow. The witness again answered he could not recall writing the letter, nor did he recall delivering either of the letters to Mr. Irving Link, but admitted that the second letter was also in his handwriting.

Both initially and at the end of the testimony, the Court instructed the jury to consider this evidence only as to defendant Dranow. However, later the Court decided that the possible prejudice to the other defendants outweighed the testimony's relevance and it instructed the jury to

disregard the testimony of both Dranow and Link as to these letters, and not to take this testimony into consideration in arriving at its verdict.

We hold there was no error as the letters were admissible to impeach Dranow. The trial judge exercised wise discretion in refusing to grant a mistrial, and he protected the rights of the other defendants by directing the jury to entirely disregard the letters.

The other claimed errors relating to the admission or exclusion of evidence, including evidence as to benefits payable by the Pension Fund, have been considered, and we hold there was no prejudicial error.

Other contentions by some or all of the defendants as to production of corporate documents, that the trial judge was guilty of misconduct, as to Government counsel's comments in arguing to the jury, and that certain instructions were erroneous, all have been carefully considered. We find no error therein. Each claim of error by counsel for defendants has been carefully considered and all such claims of error are hereby denied.

The judgments of conviction in each of the appeals, Nos. 14892, 14893, 14894, 14895, 14896, 14897 and 14898 are

AFFIRMED

Nos. 14892, 14893, 14894, 14895, 14896, 14897 and 14898.

SWIGERT, *Circuit Judge*, dissenting.

My dissent is based upon several grounds. First, a number of trial errors independently require a reversal of the convictions of all defendants. Additionally, a reversal without remand is required as to certain defendants because the Government's proof sustained neither a single scheme to defraud the Teamsters' Pension Fund as charged in the indictment, nor a single, overall conspiracy to violate the mail fraud statute as alleged.

My apology for the length of this dissent rests largely on the fact that the evidence as to many of the loan transactions must be discussed briefly.[1] Only then does it become apparent that there was a fatal variance between the charges and the proof and that much irrelevant, prejudicial evidence was submitted to the jury. Moreover, in order to demonstrate that prejudicial trial errors occurred, certain relevant background facts must be stated. Several trial errors will be discussed first.

I.

1. THE IMPEACHMENT OF HOFFA BY THE TENNESSEE CONVICTION

In my opinion the district court committed reversible error in permitting the Government to impeach the defendant Hoffa by his conviction of jury tampering in a federal district court in Chattanooga, Tennessee.[2] The impeaching evidence should not have been permitted to be used because of the Government's ordering of the

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[1] The facts were multifarious and complex. The trial lasted three months. The record consists of approximately 17,000 pages of testimony and trial proceedings.

[2] *United States v. Hoffa*, 349 F. 2d 20 (6th Cir. 1965), *cert. granted*, 382 U.S. 1024 (1966).

Chattanooga and Chicago indictments to create an atmosphere of prejudice against all defendants through an otherwise unrelated, factually subsequent conviction of one of them.

The indictment against the defendants in the instant case was returned on June 4, 1963,[8] less than one month after Hoffa was indicted for jury tampering in Tennessee. The facts giving rise to the Tennessee charge, however, occurred sometime after those which prompted the prosecution of the present case. At the arraignment in this case in June 1963 all defendants announced that they were ready for trial and offered to waive all pretrial motions in order to obtain a speedy trial. The Government resisted all such efforts, however, stating that it wanted to try the Tennessee case first because it involved "one of the defendants" named in the indictment. The district judge acceded to the Government's position. The Tennessee case began in January 1964, and Hoffa was convicted of jury tampering on March 4, 1964. Following Hoffa's Tennessee conviction, all defendants moved for a continuance of the instant trial, which had been set for April 27, because of the fear of prejudicial publicity and the use of Hoffa's conviction for impeachment purposes pending its appeal. These motions were also denied and the trial proceeded as scheduled.

In this manner the Government was permitted to arrange the trial date in this case so that the Tennessee case could be tried first and thereby be used for impeachment purposes even though only a single defendant was involved therein and even though that conviction was for an offense occurring subsequent to the alleged offenses

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[8] On the same day, in the federal district court for the Southern District of Florida, the Government moved to dismiss an indictment returned in October 1961 which charged Hoffa with mail fraud and conspiracy in connection with the promotion of the Sun Valley enterprise among Teamsters locals and their members.

being tried in the instant prosecution. In these circumstances this court should adopt the view expressed by the Pennsylvania Supreme Court in *Commonwealth* v. *McIntyre*, 417 Pa. 415, 208 A.2d 257 (1965). In treating a similar situation, that court stated:

> Generally, the scheduling of criminal trials is a matter within the discretion of the Commonwealth. We are unwilling to allow opportunity for arranging the trial of cases so that a criminal record might be created where the record would not otherwise exist were the earlier offenses tried promptly.
>
> What we here decide is that on the particular record facts and circumstances of this case the introduction of the defendant's criminal record of crimes committed subsequent to the charge being tried was unduly prejudicial and unfair. This requires that the conviction be set aside and that a new trial be had. Especially is this so because, in this instance, the prejudice created by the introduction of the subsequent criminal record far outweighed the Commonwealth's need in the trial of the case, as an evidentiary circumstance, to impeach defendant's credibility by use of these particular records.
>
> If for some compelling reason the local trial calendar or the orderly administration of criminal justice is better served by trying a subsequent offense first, then a criminal record so created should not be admissible against a defendant in his later trial. . . . 208 A.2d at 261.

Furthermore, there was no waiver by Hoffa's counsel of an objection to the impeaching testimony. The question of its admissibility was raised both at a pretrial hearing and during the trial in advance of Hoffa's testimony, when the district judge was asked whether he would permit the disclosure of the Tennessee conviction. The

record permits no doubt that its admissibility was challenged on both occasions. The Government objected to a ruling in advance of Hoffa's taking the stand.[4] The judge, however, ruled that he would allow the impeaching question to be asked and answered even though the Tennessee conviction was pending on appeal. Given this ruling, it is understandable from the standpoint of defense trial strategy that no formal objection to the impeaching question was raised when it was put to the witness before the jury and that Hoffa's counsel argued as he did in reference to the Tennessee conviction in his summation. Once an objection is unqualifiedly interposed, there is no requirement that it be renewed at the risk of waiver.

2. The Letters Used To Impeach Dranow

The defendant Benjamin Dranow testified in his own behalf. At the time of the trial he was under sentence in a federal prison for convictions of mail fraud, income tax evasion, and bail-jumping. His competency had been challenged during the voir dire examination after the district judge disclosed that he had received a long, rambling, and rather incomprehensible telegram from Dranow. During the trial Dranow made frequent outbursts and had many verbal clashes with the judge, the attorneys, the marshals, and even spectators. As a witness, he was vulgar and boisterous.[5] Repeated defense motions for a mistrial or a severance from Dranow were denied.

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[4] If the Government had been successful in this endeavor, the tactic would have permitted the question to be asked even though the court might not have permitted it to be answered.

[5] As a rather mild illustration, when Dranow was asked on cross-examination whether he had any connection with the Teamsters' Pension Fund, he replied, "Yes, I'm their representative in the prison. If the prison wants a loan, I will recommend it."

During Dranow's cross-examination, the prosecutor inquired:

> Mr. Dranow, did you ever write a letter to S. George Burris in which you told him, 'Everything can be blamed on me, and everything that could be put on to me to protect others should be blamed on me. But don't let that affect your feelings toward me in any way whatsoever."

Defense counsel objected. The judge overruled the objection with the statement that if the question were answered, it must be "followed up." The prosecutor assured the court that this would be done. After further objection that the communication inquired about was "after the alleged offense," the court instructed the jury to consider the matter only as to Dranow for the purpose of impeachment. Motions for a mistrial and a hearing outside the presence of the jury were denied. Dranow, after being shown the letter, which was undated, admitted in was in his handwriting, but said he did not know when he sent it or to whom it was written.[6]

Dranow was then asked:

> Did you write a letter, Mr. Dranow, saying: "I want the following amounts put away for me from each of the following persons each day. I want all this money put in one spot where it will be picked up four or five times a year and enable me to pay for the new place and business: a. The California buildings; $10 per day; b. George Burris, Irving ask George, $10 per day; c. Sam Hyman, George, ask Sam $10 per day; d. Cal Kovens, George ask Cal, $10 per day; e. Glen Hilborn Fashion Mart Building, George ask Glen, $5 per day; f. Lou Gladstone, Milton talk to Lou, $15 per day." Did you write that, sir?

[6] The salutation on the letter read "Dear George."

Objections to this question and motions for severance were again overruled, and the judge again limited the evidence to Dranow. Dranow replied that the letter was in his handwriting, but that he didn't recall the details of when he had written it or whether it had been delivered to Irving Link.

Irving Link, who had testified during the Government's case-in-chief, was later recalled as a rebuttal witness. Link testified that Dranow told him in September 1962 that there would be mail addressed to a friend of Dranow's, Buck Traub, which was meant for Link. Link said that a letter, thus addressed, later proved to contain the two letters about which Dranow was questioned.

Subsequently, the judge refused to admit the letters into evidence. He referred to the prejudicial nature of the letters, noted that an "inference" could be drawn that they referred to Dranow's other prosecutions, and also commented that "weighing the dangers against the benefits. I am going to protect this record." Later the judge instructed the jury to disregard the testimony of both Dranow and Link in regard to the letters.[7]

If the communications just discussed were relevant at all, a conclusion subject to considerable doubt, they

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[7] The cautionary instruction given reads as follows:

Among the last witnesses you hear in the last testimony you heard was some testimony about a witness by the name of Link, and the cross-examination of Mr. Dranow.

In the course of interrogation of Mr. Dranow and the interrogation of Mr. Link, some reference was made to some letters.

The court instructs you to disregard the testimony of both Mr. Dranow and Mr. Link in regard to those letters, and do not take that into consideration in any way in arriving at your verdict.

were admissible only to impeach Dranow.[8] Indeed the trial judge so recognized, at all times attempting to limit consideration of the letters by the jury to that defendant. The majority opinion assumes without discussion that the admissibility of these communications against Dranow, attended by cautionary instructions to the jury, effectively disposes of the other defendants' objections. The possible relevance of the documents to the impeachment of Dranow, however, is not determinative of the most important question raised. The crucial question is whether the disclosure of the contents of the letters was so prejudicial to the other defendants that the prejudice could not be cured by the final exclusion of the letters from the evidence, that is, whether the other defendants were entitled to a severance from Dranow because of the prejudice so injected by the prosecutor.

There is only one answer to this question. The letters were inherently prejudicial to all defendants. Together they conveyed a strong inference of guilt of all; as to those named in the second letter, the inference was inescapable that they were guilty of some misconduct for which they could be blackmailed for an indefinite period of time. Asking a jury to compartmentalize or disregard

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[8] The Government argues in this appeal that the letters were admissible against Dranow because they were received by Link during the existence of the conspiracy and, alternatively, that they were admissible against all defendants as "verbal acts . . . relevant to prove the existence of a conspiracy." Aside from the fact that this belated argument appears designed to avoid meeting head-on the defendants' principal contention relating to the inherent prejudice of the letters, the argument is without merit. First, Sun Valley was completely rehabilitated and Local 299 had recovered its funds when the letters were received. Second, the letters could not qualify as "verbal acts" inasmuch as they were not written in explanation of an independently material act.

such evidence was an impossible task.[9] There can be little doubt that the prosecutor's efforts to impeach Dranow in this manner were in fact attempts to inject highly inflammatory material into the case prejudicial to all the defendants. The courts have consistently held that the harm thus created cannot be undone by instructions from the trial court. *United States* v. *Clarke*, 343 F.2d 90 (3d Cir. 1965); *Scott* v. *United States*, 263 F.2d 398 (5th Cir. 1959); *Holt* v. *United States*, 94 F.2d 90 (10th Cir. 1937).

In this circuit, in *United States* v. *Haupt*, 136 F.2d 661 (7th Cir. 1943), statements tending to incriminate not only the defendants who made them but also other defendants were admitted only against the defendants who made them, under instructions from the court. We held there that such efforts to limit the evidence to the individual declarants were ineffectual and that the trial court erred in denying the various defendants' motions for a severance. We stated:

> A reading of these statements, however, leaves no room for doubt but that they were damaging not only as to the defendants against whom offered but as to all others. We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any court, could perform such a herculean feat . . . .
>
> We are unaware of any procedure which the trial court could have devised, other than a severance, by which these incriminating statements could have been intro-

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[9] That the letters may have had a deep impact on the jurors is evidenced by the fact that the juror who eventually became the foreman showed alternate juror Pare a newspaper account of the events surrounding the efforts to introduce the letters into evidence.

duced against the defendants making them, without seriously prejudicing the rights of other defendants. *Id.* at 672.

The defendants' motions for severence from Dranow should have been granted.

2. Communication with the Jury, in the Absence of the Defendants

Another trial error concerns a communication by the judge with the jury in the absence of the defendants and their counsel, after the jury had retired to deliberate upon its verdicts.

During the discussion over requested instructions between the district judge and counsel, the judge indicated that he proposed to read the indictment to the jury, but that he did not intend to send a copy of it to the jury room. The defendants did not object to a reading of the indictment, but suggested that certain portions upon which evidence had not been offered be omitted. The judge nevertheless indicated that he intended to read the entire indictment. During his charge, however, he did not read the entire indictment; he omitted certain of the portions to which the defendants had voiced objection and also omitted the allegations contained in seven counts, advising the jury that these counts had been dismissed.

After the jury returned its verdicts, defense counsel inquired whether the jury had a copy of the indictment in its possession during its deliberations. The judge informed them that the jury had in fact been given a copy. It was later disclosed through the testimony of the deputy marshal in charge of the jury that he had received a sealed communication from the jury during the course of its deliberations which he delivered to the judge. On one of the two pages in this note, the following appeared:

1 Document of all counts
2 " of law on all counts
3 " of overt acts named
Please return

The second page contained the signatures of each member of the jury. It was also disclosed that upon receiving this communication, the judge directed the deputy marshal to deliver the indictment to the jurors and to tell them that "they could have this and nothing more." Neither Government or defense counsel nor the defendants were notified of this request from the jury, nor were they informed of the judge's action in response to it, despite the fact that the judge had expressly stated that such notice would be given.[10]

The action of the district judge in sending the indictment to the jury room without notifying counsel and in communicating with the jury through the deputy marshal out of the presence of the defendants and their counsel was a violation of the defendants' rights under the sixth amendment, as well as a violation of Rule 43 of the Federal Rules of Civil Procedure. The decisions in which conduct similar to that condoned by the majority has been condemned are legion. *E.g., Shields* v. *United States,* 273 U.S. 583 (1927); *Rice* v. *United States,* 356 F.2d 709 (8th Cir. 1966); *United States* v. *Neal,* 320 F.2d 533 (3d Cir. 1963); *Jones* v. *United States,* 308 F.2d 307 (D.C. Cir. 1962); *Evans* v. *United*

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[10] The record discloses the following statement by the judge after his charge to the jury:

> I request that all parties involved . . . leave with the Marshal your phone numbers at which you can be readily reached in case there is a verdict or in case there is some inquiry made by the jury, so that within an hour's time of the time a question is asked or a verdict is arrived at, we can all assemble here.
>
> Have your clients available if they desire to be here for the verdict or whatever question may be asked.

States, 284 F.2d 393 (6th Cir. 1960); *Little* v. *United States*, 73 F.2d 861 (10th Cir. 1934).

A defendant's right to be present at all stages of a criminal trial includes the right to be present on those occasions when the judge communicates with the jury during its deliberations on any important matter. "Private communications, even though harmless in themselves, may open the way to abuses and may destroy confidence in legal procedure and the judiciary. Therefore, it is improper for the judge to hold any important communication with the jury concerning the case unless openly and with opportunity to the accused to be present and to object and to take exceptions." *Ray* v. *United States*, 114 F.2d 508 (8th Cir.), *cert. denied*, 311 U.S. 709 (1940).

The majority opinion dwells upon the assistance which the jury may have derived from the indictment in identifying the substantive charges against each defendant, and adverts to the unquestioned rule that a jury may be entitled to have the indictment during its deliberations, citing *United States* v. *Press*, 336 F.2d 1003 (2d Cir. 1964), *cert. denied*, 379 U.S. 965 (1965). These observations are irrelevant. The point which the majority fails to emphasize is that the indictment was transmitted to the jury in response to a request which was ambiguous at best, and was accompanied by an oral communication through the marshal that no more information would be furnished—without notice to the defendants and their counsel and without an opportunity to be present to offer comments or objections. This was plain error.

Although the majority does not recognize the judge's action as error, it does acknowledge that it was "not good practice" for the judge "to have sent the brief message and the indictment" to the jury in the absence of the defendants and their counsel. The majority then concludes that the defendants were not prejudiced thereby. The fault with this conclusion is twofold. First, it is doubtful that a

showing of prejudice was required, since the error committed was of constitutional proportions." *Shields* v. *United States, supra; Arrington* v. *Robertson*, 114 F.2d 821 (3d Cir. 1940). In any event, in all the decisions involving communications between court and jury in the absence of defendants, prejudice is strongly presumed and the burden is upon the Government to produce evidence showing that no prejudice resulted. *Rice* v. *United States, supra; Little* v. *United States, supra.* In *Walker* v. *United States*, 322 F.2d 434, 436 (D.C. Cir. 1963), cited by the majority, the court said that "we cannot let [the defendant's] conviction stand 'unless the record completely negatives any reasonable possibility of prejudice' to him arising from the judge's error." Second, here a "reasonable possibility" of prejudice to the defendants affirmatively appears in the record. For example, a portion of the indictment not read to the jury during the court's charge appears as follows:

> The action of the defendant, James R. Hoffa, in depositing funds of . . . Local 299 in the . . . [bank at] . . . Orlando, Florida, was being questioned by the court-appointed Board of Monitors for the International Brotherhood of Teamsters . . . in a judicial proceeding in the United States District Court for the District of Columbia . . . as a breach of his fiduciary duties.

Even Government counsel recognized that the jury should not be informed of this and other allegations in the indictment upon which no evidence was offered.[11] Yet, the indictment sent to the jury was unexpurged. More importantly,

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[11] During the conference on instructions, the prosecutor, in reply to the judge's inquiry whether the Government had excluded any reference to the counts which had been dismissed from its proposed jury instructions, stated:

> Yes, I did, your Honor. I thought we ought to in fairness to the defendants. I also left out the material with reference to the monitor's proceedings which was excluded by your Honor—

the jury's note was subject to interpretation as requesting something other than, or in addition to, the indictment. The communication itself indicated that the jury may have been confused and uncertain. In these circumstances, this court should not speculate that no prejudice to the defendants resulted when further inquiry on the part of the jury was immediately foreclosed by the judge through an oral communication by the marshal in the absence of the defendants and their counsel.

II.

The indictment in this case was hinged upon the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, which generally proscribe the use of various communications media in the furtherance of schemes to defraud or to obtain money by fraudulent representations. Each of twenty-seven substantive counts contained identical allegations charging the devising and execution of a single, all-inclusive scheme to defraud the Teamsters' Pension Fund, differing only in the particular interstate transmission alleged to be in furtherance of the scheme. The final count charged a single conspiracy among all the defendants to use the communications media in the execution of the overall scheme which they were alleged to have jointly devised.

The indictment contained allegations of certain background facts preliminary to outlining the alleged scheme. As the central part of this background, it was alleged that in 1955 Hoffa obtained a secret financial interest in Sun Valley, Inc., a Florida corporation engaged in the sale of real estate, and that he also placed $400,000 belonging to the Detroit Teamster Local 299 in the Florida National Bank at Orlando as collateral to secure a loan granted by the bank in that amount to Sun Valley; that Sun Valley thereafter met with financial difficulties and was unable to repay the loan and that the bank therefore refused to release the funds held as security. It was alleged that Dranow formed Union Land and Home Company, Inc. in Sep-

tember 1958 to acquire and succeed Sun Valley, which was then under the process of reorganization under the bankruptcy laws; that Burris, Dranow, and Weinblatt, at Hoffa's direction and for his benefit, undertook to acquire Sun Valley, to pay its debts and the reorganization costs, and thereby to secure the release of Local 299's funds from the bank.

The scheme to defraud the Teamsters' Pension Fund was alleged to have been devised sometime prior to July 2, 1958 by all the defendants. It was allegedly designed to defraud the Fund by the obtainment of loans through false representations. The various roles which each of the defendants was alleged to have played in the fraudulent securement of these loans can be stated in general terms. Dranow, Burris, Kovens, and Weinblatt were alleged to have cooperated in seeking out loan applicants and assisting them in preparing materially false applications to the Fund. Strate and Hyman were alleged to have been among those who submitted such applications. Hoffa was alleged to have used his position as a trustee of the Pension Fund to further misrepresent the facts and thereby influence approval of the loans. The indictment alleged that by virtue of this scheme the defendants diverted more than one million dollars from the proceeds of loans from the Pension Fund to themselves in the form of fees, contracts for services, and control of borrowing corporations, and that more than one hundred thousand dollars of the funds so diverted was used to rehabilitate Sun Valley.

The loans which were alleged to have been included in the scheme devised by the defendants were listed in the indictment. These loans, totalling more than twenty million dollars, included loans:

1) To remodel the New Everglades Hotel, Miami, Florida;

2) To refinance and enlarge the Fountainebleau Motor Hotel, New Orleans, Louisiana;

3) To finance construction of a shopping center, renovation of apartment buildings, acquisition of real property, and payment of mortgages by the Key West Foundation Company, Key West, Florida;

4) To finance the purchase by Casa Marina Hotel Corporation of the Casa Marina Hotel, Key West, Florida;

5) To finance the purchase by LaConcha Hotel Corporation of the LaConcha Hotel, Key West, Florida;

6) To obtain permanent financing for Four-Three-O-Six Duncan Corporation, Saint Louis, Missouri;

7) To finance the purchase by First Berkeley Corporation of buildings known as Connell Buildings and Cornell Buildings, and a leasehold interest in the Beverly Wilshire Health Club, located in the vicinity of Los Angeles, California;

8) To pay off obligations and make improvements to the Cornell Buildings operated by First Berkeley Corporation in Los Angeles, California;

9) To refinance mortgages on the Miracle Plaza Shopping Center, Vero Beach, Florida;

10) To construct North Miami General Hospital, North Miami, Florida;

11) To provide financing for the Miami International Airport Hotel, Miami, Florida;

12) To provide financing for the Birmingham Airport Hotel, Birmingham, Alabama;

13) To construct and improve the Causeway Inn, Tampa, Florida

14) To refinance mortgages and other obligations of Club 300, Upper Saddle River, New Jersey.

From this brief outline of the charges against the defendants, a number of observations become pertinent. In an indictment such as the present one, for all practical purposes there is no difference between the substantive charge of devising and executing a scheme to defraud and the charge of conspiring to commit the substantive offense, that is, unlawfully agreeing to devise and execute the scheme. "A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy." *Pinkerton* v. *United States*, 328 U.S. 640, 647 (1946); *Cochran* v. *United States*, 41 F.2d 193, 199 (8th Cir. 1930). The Government's theory of the indictment and the evidence demonstrates this fact. The scheme to defraud was attempted to be shown as an unlawful joint enterprise by the defendants, that is, a conspiracy. Thus, but for the fact that the law permits separate substantive mail and wire fraud counts to be based upon individual communications, the scheme and the conspiracy merged insofar as the evidence related to the proof of them.

Another characteristic of the indictment is its preoccupation with the financial well-being of Sun Valley. In the Government's efforts to charge and prove a single scheme or conspiracy among all the defendants, Sun Valley became the unifying element. The majority opinion explicitly recognizes that, at least under the Government's theory of the case, the extrication of Sun Valley from its financial difficulties, for Hoffa's benefit, was the common object of the alleged scheme to defraud the Pension Fund. Such a cohesive force among the defendants was necessary to avoid the objection that multiple schemes or conspiracies encompassing fewer than all of the defendants were involved. The existence of multiple conspiracies would have necessitated separate trials to avoid a fatal variance in the proof similar to that occurring in *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

The difficulty in placing Sun Valley in a position of prominence as the central physical objective of the alleged

scheme is nevertheless visible in the indictment. The defendants were alleged to have diverted over one million dollars to themselves, yet only one hundred thousand dollars was alleged to have "trickled down" to Sun Valley, a relatively insignificant amount which could have been supplied from any one of several "finders fees" paid by various recipients of loans from the Pension Fund. As the defendant Kovens suggests, had the charge been merely that the defendants devised a scheme to enrich themselves at the expense of the Pension Fund, the task of binding them together would have been manifestly more difficult. It is also significant to note that the last recorded activity in discharging the Sun Valley indebtedness occurred in June 1960 and that the $400,000 belonging to Teamsters Local 299 was released by the Florida National Bank at Orlando on June 27, 1960.

If the Sun Valley situation was in fact the tying element in this case, then its position calls for an obvious, but seemingly overlooked, clarification. The defendants were not on trial for effecting the reorganization of Sun Valley. The rehabilitation of Sun Valley, or, to use the Government's epithet, the Sun Valley "bail out," was not illegal per se. The fact that Hoffa may have had a "secret" interest in Sun Valley or that his actions with respect to it may have been in violation of some duty owed by him to the members of Teamsters' Local 299 had nothing whatever to do with the crime charged in the indictment. The only legitimate reason for the inclusion of the Sun Valley and Union Land and Home Company operations in the indictment and the submission of evidence in respect to them was to show how these operations may have furnished a motive for, or been the object of, a scheme to obtain loans from the Pension Fund through false and fraudulent representations. Therefore, the Government's repeated inferences, both during the trial and in this appeal, that Sun Valley could only be associated with skullduggery and other varieties of evil-doing are largely

beside the point. If rescuing Sun Valley was an "end," then for the purposes of this case it could have been no more than the lawful object of a conspiracy to achieve a lawful end by unlawful means.

A similar observation should be made with respect to the aura of criminality cast about the payment of fees ("pay offs") and other "diversions" from loan proceeds as such.[12] The payment of a fee to one who insists in the procurement of a loan, whatever else it may be, is not of itself a fraud upon the lender. Nor are "diversions" fraudulent standing alone, as the trial court recognized in its instructions to the jury, if not in the reception of evidence.

The gist of the crime charged in this case resides in the allegations and evidence submitted in respect to false and fraudulent representations made to the Pension Fund by the defendants. Unless this essential element of the crime was proved, the alleged diversions of money to Sun Valley, although necessary to bind the defendants together, were meaningless. Thus it was incumbent upon the Government to prove that loans were obtained from the Pension Fund through material misrepresentations by the defendants, and also to prove that the defendants had joined together to do precisely this sort of thing for some reason common to all of them. This common object, the Government says, was Sun Valley.

With these premises in mind, an analysis of the evidence reveals a fatal variance from the crimes charged

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[12] As an example of the climate which was created in connection with Sun Valley and the payment of fees, the Government asserts that knowing participation in the conspiracy is shown by the awareness on the part of certain defendants that the "price" of getting Pension Fund loans was to make money available to rehabilitate Sun Valley. While such conduct may be morally reprehensible, it does not amount to a fraud upon the Pension Fund, the crime charged in the indictment, absent some misrepresentation to the Fund.

in the indictment, prejudicial to the defendants Strate, Hyman, and Kovens, and a great mass of evidence which was wholly irrelevant to the crimes there charged, prejudicial to all the defendants.

4. VARIANCE IN THE PROOF

The evidence, viewed in the light most favorable to the Government, does not disclose a single scheme to defraud the Pension Fund through misrepresentations in order to rescue Sun Valley from financial ruin. Instead, the resumé of the evidence which follows tends to show several smaller and distinct schemes, involving different combinations of the defendants and with two or three defendants common to all the schemes, each designed to effect the personal enrichment of the particular members of the scheme. Yet all the evidence relating to all of the loan transactions alleged in the indictment was admitted against all the defendants.

(a) *The Everglades Hotel Loans*

Two loans were made by the Pension Fund to Vaughn B. Connelly[13] to finance the renovation of the Everglades Hotel, Miami, Florida. The first loan, $3,300,000 was obtained in January 1959. Kovens was the building contractor. He brought Dranow and Burris into the loan negotiations. Burris helped to prepare the application. Later, Hoffa joined the discussion relating to this application. The evidence shows that Connelly made payments to Dranow totalling $300,000 in connection with this loan, under suspicious circumstances which the majority opinion has pointed out. The evidence also shows that Connelly paid $15,000 to Hyman Greenberg, Dranow's brother-in-law, which found its way into Union Land and Home Company to assist in the rehabilitation of Sun Valley.

[13] Connelly, the principal Government witness, was not named as a coconspirator, although his position appears to differ from that of defendants Strate and Hyman only in degree.

This money, however, was not shown to have come from the Pension Fund loan. Further, no misrepresentations to the Pension Fund in connection with this loan were proved, and the indictment did not include a substantive charge based upon any mailings relating to it. Strate and Hyman nowhere appear in connection with this loan.

The second Everglades loan, for $1,000,000, was secured by Connelly in July 1959. Burris and Dranow assisted in the preparation of the loan application, and Hoffa was influential in obtaining its approval. No direct misrepresentations appear to have been made in this application, but the evidence does show that at the time the loan was paid out, an inspection, an appraisal, and the execution of a mortgage as a part of the security for the loan had not taken place, and Connelly had not yet paid a required $5,000 "service charge" to the Fund. Assuming that these latter items amounted to material misrepresentations to the Pension Fund, the evidence failed to connect Strate and Hyman with the second Everglades loan, and Kovens can only be connected by inference from his association as the contractor on the hotel. Nor was there any showing that any money from this loan was diverted to Sun Valley.[14]

(b) *The Pelican-Fountainebleau Loans*

The Government introduced evidence of four loans made by the Pension Fund to the Pelican State Hotel Corporation, partly owned by the defendant Strate, to refinance and enlarge the Fountainebleau Hotel in New Orleans. These were the only loans with which Strate had any

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[14] The mailing alleged in the first count of the indictment related to this loan. All the defendants were found guilty on this count, the only loan transaction as to which defendants who did not directly participate were accorded joint substantive responsibility.

connection. The dates and amounts of these loans are as follows:

1.	July 1959	$1,350,000
2.	February 1960	2,325,000
3.	December 1960	500,000
4.	March 1961	500,000

The evidence shows that Dranow and Burris assisted Strate with his applications for these loans and that Hoffa was aware of their efforts and was again instrumental in securing the approval of some of the loans. The evidence also shows the payment of substantial fees and the granting of other concessions by Strate to Dranow and Burris in connection with at least the first two loans. It further shows several misrepresentations made to the Pension Fund with respect to the applications for the second and third loans.[15] Finally, the evidence reveals that Strate diverted substantial portions of the loan proceeds to his own benefit and that he "came up with" $50,000 for the Sun Valley enterprise. The third and fourth loans, however, were granted after the rehabilitation of Sun Valley had taken place. Further, the evidence failed to disclose that either Hyman or Kovens had any connection with, or knowledge of, the Fontainebleau loans. The majority opinion states that "representatives of Strate contacted Kovens who referred them to Dranow," as an indication of complicity on the part of Kovens. The evidence shows only that an attorney friend of Strate's, Cohen, and a Miami restaurant owner, Elliott, contacted Kovens and unsuccessfully attempted to interest him in financing the Fountainebleau. Later Kovens introduced Elliott to Dranow. Dranow thereafter contacted Strate in New Orleans.

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[15] Strate was convicted on the substantive counts alleging mailings relating to the first three loans. Hoffa was found guilty on the count relating to the second loan. The remaining defendants were acquitted on all the counts pertaining to the Fountainebleau loans.

(c) *The Key West Foundation Loans*

The Pension Fund granted two loans to the Key West Foundation Company, which owned apartment buildings in Key West, Florida. The defendant Hyman and his wife held fifty per cent of the stock in Key West. The first loan, in the amount of $875,000, was obtained in July 1959 through the combined efforts of Hyman and Burris. The evidence indicates that Hyman "invested" $100,000 of the proceeds of this loan in the Union Land and Home Company (Sun Valley) at the suggestion of Burris. No misrepresentations to the Pension Fund were proved as to this loan and the district court dismissed the count in the indictment which recited a mailing relating to it.[16]

A second loan of $400,000 was granted to Key West in June 1960 to remodel the Poinciana Apartments. The evidence supports the charge that both Hyman and Hoffa made certain misrepresentations to the Pension Fund in regard to the loan application. Hyman's false statements were flagrant, relating principally to periodic proofs of expenditures which were required to be submitted to the Fund before disbursements could be made on the loans. Hoffa's misstatements were of a relatively minor nature and occurred while he was arguing in favor of the loan to the trustees of the Fund. They conveyed a false impression that business conditions in Key West were on the upgrade. The proceeds of the second Key West loan were not disbursed by the Pension Fund until the rehabilitation of Sun Valley was an accomplished fact; therefore, no such diversion was proved. Further, neither Kovens nor

[16] The indictment charged that the Hymans misrepresented that they were the sole owners of Key West stock when in fact they owned only 50%. The trial court held this to be an immaterial misrepresentation following the testimony of a Pension Fund official to the same effect.

Strate was shown to have even known about the loans to Key West.[17]

(d) *The La Concha and Casa Marina Hotel Loans*

Late in 1961 Hyman applied to the Pension Fund for loans totalling $650,000 to finance the purchase of the La Concha and Casa Marina Hotels, Key West, Florida. The loans were approved in January 1962 on Hoffa's motion. As a condition for the disbursement of $217,000 of the loan proceeds, the Pension Fund required that satisfactory leases of the hotels to a responsible person be executed. Hyman leased the hotels to Charles Lavin, an operator of retirement hotels who had been working for him at a salary of $100 per week for several months, apparently assisting in the establishment of a retirement plan at the hotels. The balance of the loan proceeds were disbursed in March 1962, but Hyman fired Lavin and the hotels were never operated under the leases.

No diversions from loan proceeds were shown and the loans were disbursed long after Sun Valley had been rehabilitated. The other defendants were not connected to the La Concha-Casa Marina transactions, except that Burris was present with Hyman when the appraiser for the Fund inspected the properties.[18]

(e) *The First Berkeley Loans*

The Pension Fund made three loans to the First Berkeley Corporation, a real estate corporation in which Burris was the sole stockholder of record.

A loan of $266,000 was granted in January 1960 to acquire the Beverly-Wilshire Health Club near Los Angeles. The Government conceded at the trial that no

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[17] Hyman was found guilty on four counts relating to the second loan. All other defendants were acquitted on these counts.

[18] Hyman was convicted on two counts relating to the loans. All other defendants were acquitted on these counts.

misrepresentations were made in connection with this loan. The second loan to First Berkeley, for $2,966,000, was granted in March 1960 to acquire the Cornell Buildings in Los Angeles. Burris made several misrepresentations in the loan application concerning First Berkeley's collateral and financial condition which might have been material considerations in the granting of the second loan, although certain of the misstatements cited by the Government are of questionable significance. The evidence is perhaps sufficient to connect Hoffa and Dranow with this loan by their knowledge of Burris' activities.[19] The evidence, however, failed to establish that any of the loan proceeds went into the Sun Valley rescue operation.

A third loan of $300,000 was granted by the Pension Fund to First Berkeley in April 1961 for improvements in the Cornell Buildings. No misrepresentations concerning this loan were proved. The loan itself was disbursed after Sun Valley had been financially restored. The Government attempted, however, to show some connection between a portion of the loan proceeds and Sun Valley by introducing evidence of a series of complicated transactions involving an earlier loan of $125,000 by John Factor to Irving Link and Murray Randolph. The Government sought to trace the proceeds of this loan through First Berkeley to Dranow and thence to Sun Valley. Finally, it attempted to show that $55,000 from the third First Berkeley loan was indirectly used to repay the Factor loan. The district court ruled that the Government failed to do so, and dismissed the two counts alleging mailings relating to this loan. The court, however, did not strike the evidence.

Neither Hyman, Strate, nor Kovens was connected with any of the loans to First Berkeley.[20]

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[19] Hoffa was convicted on the substantive count alleging a mailing in connection with the second loan. All other defendants were acquitted on this count.

[20] Kovens did permit Burris to pledge his stock in Ruedd, Inc. as collateral in obtaining the second loan.

(f) *The Good Samaritan Loans*

The Government introduced evidence concerning two loans by the Pension Fund to Good Samaritan Hospital, Inc. to finance the construction of the North Miami General Hospital. Burt Sager, a Miami attorney, was the original promoter of the hospital and the organizer of Good Samaritan Hospital, Inc. Sager contacted Kovens in the summer of 1959 and inquired into the possibility of constructing a hospital on property held by Ruedd, Inc., a corporation owned by Kovens. Following several discussions, Sager decided to apply for a loan from the Pension Fund and was introduced to Burris. Burris assisted Sager's accountant in preparing an application for a loan of $2,300,000. A loan in this amount was first approved by the Fund in September 1959, but no disbursements of loan proceeds were made until late in 1960.

The indictment alleged several misrepresentations with respect to this loan, not in connection with the application itself, but generally relating to conditions placed upon the disbursement of loan proceeds by the Pension Fund. The evidence as to the materiality of these misrepresentations is equivocal at best.[21] But assuming the materiality of one or more of them by Kovens (concerning his bond as the contractor on the project) and by Hoffa (relating to funds which were to have been made available by investors in the hospital), none of the proceeds of the loan were shown to have been diverted

[21] For example, Hoffa was shown to have represented to the Fund that Dade County, Florida was going to lease and operate the hospital and was investing as much money in it as the Pension Fund. The representations were false. They were made, however, not in connection with the application for the loan, but during a discussion concerning the reduction in the interest rate on the loan from 6½% to 6¼%.

for any purpose, including Sun Valley.[22] Kovens got a fee of $200,000 for constructing the hospital, but the reasonableness of his contracting fee was not called into question. The evidence also supports the inference that Kovens contributed $28,000 to assist in the reorganization of Sun Valley. His contribution, however, was not connected to the Pension Fund in any way; in fact, the payment was made before the proceeds of the first Good Samaritan loan were disbursed.

The Pension Fund granted a second loan of $500,000 to Good Samaritan in June 1961 to finance an increase in the size of the hospital. A single immaterial misrepresentation relating to this loan was proved. Eight days after the second loan was approved, during a discussion of an unrelated loan application submitted by Kovens, Hoffa told the Fund trustees that the second loan had been expended in adding another floor to the hospital, when in fact no additional floor had been constructed. The Sun Valley indebtedness had been extinguished before the loan was granted.

Finally, neither Strate nor Hyman had any connection with either of the Good Samaritan loans.[23]

(g) *The 4306 Duncan Corporation Loan*

Fred Strecker, a Pension Fund trustee, sought a Pension Fund loan to refinance property in St. Louis which he had purchased and which he held as the 4306 Duncan Corporation. Hoffa referred Strecker to Burris,

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[22] The Government expressly conceded its failure to prove an allegation in the indictment that "a substantial portion of this money had been diverted for other purposes."

[23] Burris, Dranow, Kovens, and Hoffa were found guilty of certain of the counts relating to the Good Samaritan loans. The other defendants were acquitted on these counts.

who agreed to assist in securing the loan if Strecker would retain Burris' accounting firm for his business. Burris then took Strecker to Miami where they discussed the loan application with Dranow.

Later Burris contacted Max Federbush, an acquaintance, suggested that Federbush purchase the 4306 Duncan property, and told him that he could obtain a loan from the Pension Fund to finance the purchase. Federbush had few resources of his own, but agreed to the proposition and signed without reading a number of papers put before him by Burris. Included in these documents was an application for a Pension Fund loan to 4306 Duncan Corporation, listing Federbush as its president. Burns then brought Strecker and Federbush together and obtained a loan of $15,000 for Federbush to give Strecker as a "down payment" on the property. Some time later, but before the Pension Fund considered the 4306 Duncan application, Burris told Federbush that his loan application had been rejected because of Federbush's prior criminal record and arranged for the return of "his" money. (Weinblatt deposited $15,000 in Federbush's bank account.)

Strecker attended the Pension Fund meeting at which the loan application was considered. Before the meeting began, Dranow and Burris told him that the application was being presented in the name of a "straw party," Federbush. Strecker testified that, within the hearing of several of the trustees, he told Hoffa that he objected to the loan application being presented in this manner, and that Hoffa replied, "Do you want the loan or not?" The loan was approved on Hoffa's motion and 4306 Duncan Corporation subsequently received $840,000. Despite the procurement of this loan from the Fund through the connivance of Dranow, Burris, and Hoffa, no diversions or fee payments were proved and Sun Valley was nowhere mentioned or considered. Kovens,

Strate, and Hyman were not connected with this transaction in any way.[24]

The preceding analysis relating to several of the loan transactions charged to be part of a single conspiracy demonstrates that no common design bound all of the defendants together. This case is therefore governed by *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

In *Kotteakos*, thirty-two persons[25] were charged with a single conspiracy to violate the National Housing Act by inducing financial institutions to grant loans which would then be offered to the Federal Housing Administration for insurance upon applications containing fraudulent information. The evidence, however, proved at least eight different conspiracies to obtain fraudulent loans by separate groups of defendants which had no connection with each other except that the principal defendant acted as a broker to handle the fraudulent applications in all of them. The Supreme Court held that it was reversible error to try all the defendants "*en masse* for the conglomeration of distinct and separate offenses committed by others." *Id.* at 775. The Court stated:

> The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans.
>
> This view, specifically embodied throughout the instructions, obviously confuses the common purpose

[24] The indictment did not contain a substantive mail fraud count relating to this loan, but three overt acts pertaining to it were included in the conspiracy count.

[25] Nineteen persons were tried. The cases of thirteen were submitted to the jury. Seven were convicted.

> of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character.
>
> • • •
>
> When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. *Id.* at 768-69, 773.

Thus in *Kotteakos*, as here, the vice lay in the fact that the prosecution was allowed to proceed on the theory that a generic description of the substantive crime which the defendants were alleged to have conspired to commit was a sufficient common objective so as to make each defendant a codefendant with the others named in the indictment.

Hoffa, Dranow, and Burris were common actors in the majority of those loans in which evidence of fraudulent representations was present. Therefore, as to them, the joinder of multiple subsidiary conspiracies could not have been prejudicial. *Kotteakos* v. *United States*, *supra*. But the participation of Strate and Hyman in only those loans in which they were interested as borrowers and the participation of Kovens in only those loans in which he stood to acquire contracts for services clearly indicate that they were seriously prejudiced by their joinder with each other and with the other defendants for a "conglomeration of distinct and separate offenses."

The evidence as to the defendant Weinblatt was wholly insufficient to find him criminally responsible with respect to any of the loan transactions.

5. Irrelevant and Prejudical Evidence

It is apparent from the foregoing discussion that a great amount of irrelevant, immaterial evidence was admitted against the defendants. Similar evidence was introduced relating to a number of loans which have not yet been examined. In fact, a substantial number of the loan transactions as to which evidence was offered and received had no logical tendency to prove either the existence or the execution of the scheme to defraud the Pension Fund charged in the indictment, or for that matter, any scheme to defraud the Pension Fund. Loans as to which no evidence of fraud was produced and which had no relation to Sun Valley were irrelevant for any purpose. Evidence with respect to these loans had a prejudicial effect against the defendants not only because of its volume and complexity, but also because it emphasized the mere association of the defendants with each other and with the Pension Fund; moreover, it tended to emphasize the payment of fees and the obtaining of advantages by various defendants even though the Pension Fund was in no way defrauded or harmed. Loans evidencing no fraud but having some relationship with Sun Valley were prejudicial for the same reasons, and even more so, because they amounted to an invitation to the jury to find a conspiracy inherent in the mere association of persons pursuing a lawful venture.

(a) *The Miracle Plaza Loan*

In June 1960 a Pension Fund Loan for $1,100,000 was granted to refinance mortgages on the Miracle Plaza shopping center, Vero Beach, Florida. One of the counts in the indictment alleged the mailing of a letter by a Miami attorney representing the borrower in connection with the

loan. It was shown that Kovens was associated in the venture. The mailing was proved, but the Government dismissed the count prior to the submission of the case to the jury. The evidence, however, was not stricken. No facts were introduced suggesting any fraud in connection with the loan or showing that the transaction was in any way linked to Sun Valley.

The Government argues in its brief that "the Miracle Plaza loans were tied to the scheme because Dranow, in promoting the First Berkeley and Fountainebleau deals, repeatedly pointed out this Kovens shopping center, which had been built with Pension Fund money, as one of his Pension Fund triumphs. On the third of these occasions, Strate and Burris were present when Dranow showed off the shopping center." It is difficult to comprehend how this observation, if correct, would "tie" Miracle Plaza to the scheme charged in the indictment and justify the submission of evidence in respect to it. But the observation is not even supported by the record, which indicates that the shopping center referred to by Dranow was located in Miami Beach, and not in Vero Beach, Florida, where Miracle Plaza was located.

(b) *The Miami International Airport Hotel and the Birmingham Airport Motel Loans*

The indictment alleged and evidence was introduced concerning two Pension Fund loans to corporations in which George M. Simon, a Miami accountant, was interested. In 1959 a $2,000,000 loan was granted to Airway Hotel, Inc. to finance the construction of the Miami International Airport Hotel. In 1961 an additional loan of $1,000,000 was granted to finance the Birmingham Airport Motel, Birmingham, Alabama. Simon obtained the loans with Burris' assistance. Burris charged two per cent brokerage fees, totaling $85,000, for his efforts. No misrepresentations with respect to these loans were proved, nor was Sun Valley ever mentioned in connection with them.

Again referring to the Government's brief, the Government argues, "The 'airport hotel' loans were relevant, not only because they also revealed the usual arrangement of Burris procuring Pension Fund loans for a fee, but also because the loans were obtained for accountant George Simon who, at about the same time (March 1960), participated in the preparation of the fraudulent loan application filed by First Berkeley with the Pension Fund." (Simon prepared a balance sheet for First Berkeley Corporation from information furnished by Burris.) That Burris charged a two per cent fee, or that Simon had dealings with Burris was totally irrelevant.[26] These circumstances did not in any way tend to prove an unlawful agreement to rehabilitate Sun Valley by defrauding the Pension Fund.

(c) *The Club 300 Loan*

A loan of $900,000 was made by the Pension Fund in 1961 to Club 300, Inc., Upper Saddle River, New Jersey, to finance a motel and bowling alley. The loan was the subject of one of the mail fraud counts in the indictment and three of the overt acts in the conspiracy count. Although the mailing was proved, the Government dismissed the substantive count before the case was submitted to the jury; however, the evidence was not stricken. James Dioguardi, a contractor, first talked to Hoffa about a loan on undeveloped land in New Jersey. Hoffa suggested that Dioguardi contact Burris. Later, Dioguardi consulted Burris regarding a loan for the Club 300. Dioguardi and the defendant Burris' son Herbert,[27] split a five per cent fee from the borrower for preparing the application. There was no evidence of any misrepresentations to the Pension Fund in

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[26] Simon was neither indicted nor named as a coconspirator.

[27] Herbert Burris, named as a defendant in the indictment, was acquitted at the close of the Government's case-in-chief. Dioguardi was neither indicted nor named as a coconspirator.

connection with the loan and all discussions about fees occurred long after Sun Valley had been rehabilitated.

As to the relevance of this loan, the Government states, "The Dioguardi-Club 300 transaction was further evidence of the general pattern of the conspiracy to place fraudulent Pension Fund loans, since it showed that, when Dioguardi told Hoffa in 1961 that he wanted a loan, Hoffa referred him to Burris." Such a "referral" does not justify the admission into evidence of all the facts concerning the application for, and the granting of, an otherwise unassailable loan. Nor was it evidence of a "pattern" of placing "fraudulent" loans.

(d) *The Causeway Inn Loans*

Pension Fund loans of $1,500,000 and $350,000 were granted to Causeway Enterprises, Inc. to construct the Causeway Inn, Tampa, Florida. The first loan was approved in October 1960 and the second a few months later. The district court directed a verdict of acquittal on the count in the indictment relating to these loans, but the evidence was not stricken.

Irving Kipnis promoted the Causeway Inn venture.[28] His first application for a Pension Fund loan was rejected. Later, he met Burris, who agreed to help secure the loan for a fee. While the application was pending, Burris told Kipnis that he needed some money for Sun Valley immediately and asked him to buy a ten per cent interest in it. Kipnis gave Burris a check for $57,000, allegedly for an "option-loan" interest in Sun Valley, the principal condition being that the money be refunded if the option was not exercised within three years. The check was given to Dranow, who used it to rehabilitate Sun Valley. Burris later received checks from the borrower for $57,000 and $58,000 as fees for his part in securing the loans. In turn,

[28] Kipnis was neither indicted nor named as a coconspirator.

Burris gave Kipnis a check for $57,000 in cancellation of the "option-loan" agreement.

Evidence was introduced to show that Kovens became the contractor on the Causeway Inn, but it showed only that Kipnis' son and son-in-law made the contracting arrangements with Kovens after the first loan was granted.

The Government also introduced evidence of a third loan to Causeway Inn, Inc. In January 1963 Kipnis appeared before the Pension Fund and requested a $1,000,000 loan to be used for the expansion of the Causeway operation through the purchase of an adjacent motel. He also requested that payments on the other loans be suspended for eighteen months because the Causeway Inn was losing money. Upon Hoffa's motion, these requests were granted by the trustees.

Thus, despite the fact that the first Causeway Inn transaction was shown to have had some relationship with the attempt to rescue Sun Valley, no evidence of fraud with respect to any of the Causeway loans was produced. The Government says that the loans were relevant because they were "tied to Sun Valley," because "Kovens got the Causeway construction contract," and because "Dranow and Burris got fees."

The Government's argument illustrates the fundamental error in the admission of much of the irrelevant evidence introduced in this case. The argument assumes that any connection on the part of any of the defendants with each other or with the Pension Fund, however innocent or remote from Sun Valley, was admissible against all the defendants to prove the scheme and conspiracy charged in the indictment. The flaw in such an assumption resides in the notion that a conspiracy is a group of people rather than an act of agreement upon a common objective. *United States* v. *Borelli*, 336 F.2d 376, 384 (2d Cir. 1964). The court in *Borelli* noted with misgiving the tendency to treat conspiracy cases in this manner. Such a practice creates

problems of the kind to which Mr. Justice Jackson referred in *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (concurring opinion), when he stated:

> When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.

The defendants in this case were faced with similar problems.

Apropos also is Mr. Justice Jackson's observation that "there generally will be evidence of wrongdoing by somebody." *Id.* at 454. Indeed it can be said that the evidence here indicates that each defendant was guilty of some kind of wrongdoing. But a conviction should not stand if there is a substantial variance between the charge and the proof or if it is based even in part upon immaterial, prejudicial evidence.

In summary, the convictions in this case should be set aside for different reasons, as to the defendants Hyman, Kovens, and Strate because of the variance in the proof, as to the defendant Weinblatt because of the insufficiency of the evidence, and as to the defendants Hoffa, Dranow, and Burris because of reversible trial errors. With regret and reluctance, I am impelled also to say that an intense study of the record convinces me that this prosecution was

designed to charge a sprawling, amorphous scheme and conspiracy, in order to allow the presentation of a series of confusing, complex transactions and to abet the introduction of a mass of immaterial, prejudicial evidence. If a person is to be prosecuted and punished for his misdeeds, he should be charged with a specific crime and convicted by proper evidence. Moreover, every defendant in a criminal case is entitled to the fundamentals of a fair trial, free of the prejudicial errors that occurred in this case.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60610

Tuesday, October 4, 1966

Before

Hon. F. Ryan Duffy, Senior Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

No. 14892, 93, 94, 95, 96, 97, 98

United States of America, *Plaintiff-Appellee,*

v.

James R. Hoffa, Benjamin Dranow, Zachary A. Strate, Jr., S. George Burris, Abe I. Weinblatt, Calvin Kovens, and Samuel Hyman, *Defendants-Appellants.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of conviction the said District Court in each of the appeals be, and the same are hereby, Affirmed, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 28, 1966

Before

Hon. JOHN S. HASTINGS, Chief Judge
Hon. F. RYAN DUFFY, Senior Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, JR., Circuit Judge

Nos. 14892-14898

UNITED STATES OF AMERICA

v.

JAMES R. HOFFA, ET AL.,

On consideration of the petition of defendants-appellants, James R. Hoffa, et al., for a rehearing in the above appeals by the court sitting *en banc,* and the answer thereto by plaintiff-appellee, United States of America;

It Is Ordered, that the petition of defendants-appellants, James R. Hoffa, et al., for a rehearing of the instant appeals by the court sitting *en banc,* be and the same is hereby denied.

Circuit Judges Knoch and Swygert voted to grant such petition for a rehearing *en banc.*